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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. 836.

JOHN P. PAULISON, SURVIVING AND SOLE RECEIVER OF THE COLUMBIAN INSURANCE COMPANY, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED APRIL 12, 1884.

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JUDD & DETWEILER, PRINTERS, WASHINGTON.

1 In the Court of Claims.

JOHN P. PAULISON, surviving and sole Receiver of the Columbian Insurance Company
vs.
THE UNITED STATES.
No. 13626.

I. *Petition.* *Filed March* 30, 1883.

To the Honorable the Judges of the Court of Claims:

Your petitioner, of the city and State of New York, and a citizen of the United States, respectfully submits the following petition:

The Columbian Insurance Company was a corporation duly organized under the laws of the State of "New York," prior to the first day of January, A. D. 1861.

That said company failed in January, 1866, and Joseph Morrison and Benaijah Leffingwell were thereupon, by the supreme court of the State of New York, duly appointed joint receivers of the property and assests of said company.

That said Morrison subsequently resigned, and George A. Osgood was by said court duly appointed in April, 1866, in place of said Morrison, as joint receiver of the property and assests of said company with said Leffingwell.

2 That said Leffingwell died in June, 1866, and Cyrus Curtiss was by said court duly appointed in place of said Leffingwell, joint receiver of the property and assests of said company with said Osgood.

That said Curtis died in June, 1879, and your petitioner was duly appointed by said court in July of that year in place of said Curtiss as a joint receiver of the property and assests of said company with said Osgood.

That said Osgood died in November, 1882, and no person has been appointed as his successor in said trust.

That your petitioner is the sole surviving receiver of said Columbian Insurance Company, and of its property and assests, and brings this petition against the United States under the instruction and direction of said court.

That said company was duly dissolved by a judicial decree of said court in February, 1866.

That by force of said decree of dissolution and the orders appointing the aforesaid receivers, they and their successor or successors in the trust became, and by virtue of the laws of the State of New York, are vested absolutely with all the interest of said company, and possessed of all its title, legal and equitable, to all its assests and property of every description whatever.

The said Columbian Insurance Company was organized for the purpose (among other things) of carrying on the business of marine insurance. While so engaged during the years 1862, 1863, 1864, and 1865 it issued various policies of insurance upon the vessels, freights, cargoes, and property of persons and parties stated in the exhibit accompanying this petition, and to the amount therein

3 set forth, which Exhibit, marked "A," is hereto attached and made part of this petition.

Said vessels, cargoes, freights, and property were insured by the said company against the ordinary perils of the sea and the acts of Confederate cruisers, which were then engaged upon the high seas in active hostility against the United States.

The "Alabama," "Florida," and "Shenandoah," with their tenders, were Confederate cruisers engaged during those years in such hostility against the Government of the United States.

The "Alabama" destroyed the bark "Amazonian" on June 2d, 1863; the ship "Ainne F. Schmidt" on July 2d, 1863; the steamer "Ariel" on December 7th, 1862; the bark "Conrad" on June 19th, 1863; the ship "Dorcas Prince" on April 26th, 1863; the ship "Emma Jane" on January 14th, 1864; the bark "Golden Rule" on January 26th, 1863; the ship "Highlander" on December 26th, 1863; the ship "John A. Parks" on March 2d, 1863; the bark "Lamplighter" on the 11th of October, 1862; the ship "Manchester" on the 12th of October, 1862; the bark "Olive Jane" on February 21, 1863; the schooner "Palmetto" on February 3d, 1863; the ship "Rockingham" on April 23d, 1864; the bark "Sea Bride" on August 5th, 1863; the ship "Sea Lark" on May 3, 1863; the ship "Sonora" on December 26, 1863; the ship "Talisman" on June 5, 1863; the bark "Tycoon" on April 27th, 1864; the ship "Winged Racer" on November 10th, 1864; with cargoes and property carried by them.

The "Florida" destroyed the ship "Anglo Saxon" on August 21st, 1863; the ship "Avon" on March 29th, 1864; the ship "Commonwealth" on April 17th, 1863; the ship "Crown Point" on May 13th, 1863; the steamer "Electric Spark" on July 10th, 1864; the
4 bark "Golconda" on July 8th, 1864; the bark "Greenland" on July 9th, 1864; the bark "Harriet Stevens" on July 1st, 1864; the bark "Mondamin" on September 26, 1864; the ship "Oneida" on April 24th, 1863; the ship "Southern Cross" on June 6th, 1863; the ship "Star of Peace" on March 6th, 1863; the ship "William B. Nash" on July 8th, 1863; with the cargoes and property carried by them.

The "Shenandoah," after she left Melbourne, destroyed the ship "Brunswick" on June 28th, 1865; the ship "General Williams" on June 25th, 1865; the bark "Gipsey" on June 25th, 1865; the ship "Isaac Howland" on June 28th, 1865; and the bark "Isabella" on June 26th, 1865, and the cargoes and property carried by them.

Whereby the vessels, cargoes, freights, and property insured as aforesaid by the Columbian Insurance Company were totally lost to the persons and parties insured as aforesaid, and by means of which said company was compelled to pay and did pay to the persons and parties so insured respectively as herein set forth the whole amount of the insurance provided in the policies of each, amounting in the aggregate to the sum of two hundred and eighty-nine thousand two hundred and sixty-six dollars, on account of the acts of the "Alabama," to the sum of two hundred and twenty-one thousand seven hundred and twenty-seven dollars on account of the acts of the

"Florida," and the sum of sixty-four thousand and fifty dollars on account of the acts of the "Shenandoah," after leaving "Melbourne," Australia, which amounts were about the actual value of the property destroyed by said cruisers at the time of its destruction.

That upon payment of said losses the various parties insured as aforesaid assigned all claim and right to recover the amount
5 of loss sustained by them from the persons or government which had wrongfully or negligently caused the destruction of their property through the acts of the Confederate cruisers aforesaid.

That the "Alabama," the "Florida," and the "Shenandoah," before it left Melbourne, in Australia, had been armed, equipped, and fitted out in the ports of Great Britain, a neutral power in the contest which the United States was waging to suppress the rebellion of the Confederate States against its authority.

This preparation of these cruisers of war-like service against the United States, and its citizens was knowingly permitted by the authorities of Great Britain in violation of that neutrality which theretofore had been established by the principles of international law, and which should have governed Great Britain in her relations to the United States and its citizens. By this negligence, misconduct, and wrong doing, on the part of Great Britain, that Government caused the destruction of the property of the persons and parties insured in said Columbian Insurance Company, as aforesaid, and became liable to pay to the said insured persons and parties the losses which had been occasioned to them by the three confederate cruisers aforesaid.

In view of this liability on the part of Great Britain, the Secretary of State of the United States under proper authority called upon the receivers of the Columbian Insurance Company, among others, to file in the State Department a statement of their claims, as such receivers, against Great Britain, with proof of the same, in order that the United States might collect them from that Government for the said receivers of said company.

In pursuance of said request, the receivers of said Colum-
6 bian Insurance Company delivered to the United States statements of all the losses it had paid to be insured as herein set forth, with proofs of the terms and conditions of payment of said losses, and of the assignment to said company of all claims on the part of the insured for reclamation from Great Britain upon acceptance, of which the United States agreed with the receivers of said company to collect the said claims from Great Britain for the receivers of said company, and upon demand to account for and pay over to the said company or its representatives all moneys which might be collected from that Government on account of said claims.

Such proceedings were then taken by the United States for the collection of said money for the receivers of said company, that on the 9th day of September, A. D. 1873, Great Britain paid to the United States the sum of $15,500,000 on account, among others, of the aforesaid claims of said receivers.

In the fund so received by the United States, Great Britain included a sum sufficient and intended to reimburse the receivers of said company for the amount paid by it to the insured owners aforesaid for the losses which they had suffered through the acts of the cruisers aforesaid, together with interest at the rate of six per cent. per annum on the amount of loss sustained by each insured person or party from the date of the destruction of his property.

Under the contract entered into between the said company and the United States when the latter received the aforesaid claims for collection, the United States received the said fund charged with the obligation and duty of accounting and paying over out of the same upon demand to the said Columbian Insurance Company or its receivers or receiver, such a sum as would compensate the said company for the amount of losses for which 7 it had been compelled to make indemnity to the insured owners aforesaid through the depredations of the "Alabama," "Florida," and the "Shenandoah," after leaving Melbourne. When the money had been received by the United States it was by act of Congress invested in a bond bearing five per cent. interest for the benefit of the parties entitled thereto. On the 31st of March, 1877, this amount, by order of the Secretary of the Treasury, was converted into the Treasury of the United States, less the sum which had been paid to persons and parties uninsured for losses inflicted by said cruisers.

Notwithstanding the United States was bound by its contract to account for and pay over to said company, or its receiver or receivers, the money so collected for said company, it, the United States, has wholly refused so to do, and did, on the thirty-first day of March, 1877, convert said fund to its own use by making it a part of the general funds of the public Treasury.

That no assignment or transfer of the aforesaid claims, or any part thereof, or of any interest therein, has been made, except as stated in this petition.

Wherefore your petitioner says that there is due him as receiver as aforesaid from the United States the sum of eight hundred and seventy-six thousand eight hundred and forty-five dollars, with interest at the rate of five per cent. per annum from the first day of January, 1874, to which he is justly entitled, after allowing all just credits and offsets, for which amount the petitioner prays judgment against the United States.

JOHN P. PAULISON,
Surviving and sole Receiver of the Columbian Insurance Company.

8 STATE OF NEW YORK,
County of New York, } *ss:*

JOHN P. PAULISON, being duly sworn, deposes and says that he is the surviving and sole receiver of the Columbian Insurance Company, that the matters and things stated and set forth in the forgoing petition are true according to his information and belief.

JOHN P. PAULISON.

Subscribed and sworn to before me, this 29th day of March, 1883.

C. B. PAGE,
Notary Public, N. Y. Co.

P. O. address of petitioner, No. 5 Nassau street, New York City.

P. O. address of petitioner's solicitor, No. 57 Broadway, New York City.

SCHEDULE "A."

The Alabama.

	Amount.	*Total.*
Bark Amazonian, destroyed June 2, 1863, partly insured.		
1. Snow & Ryder, vessel	$1,850	
2. Z. D. Bassett, Jr., "	700	
3. A. Stanwood & Co., "	1,500	
4. Bassett & Nickerson, "	8,400	
		$12,450
Ship Anna F. Schmidt, destroyed July 2, 1863.		
5. Franklin Ins. Co., Boston, cargo	2,500	
6. Haynes & Lawton	1,000	
7. New England Mutual Marine Insurance Co., Boston	10,000	
		13,500
Steamer Ariel, destroyed December 7, 1862.		
8. Ribon & Munoz, cargo		8,500
9 Bark Conrad, destroyed June 19, 1863.		
9. Sun Mutual Insurance Co., cargo		17,205
Ship Dorcas Prince, destroyed April 26, 1863.		
10. N. L. & G. Griswold, freight	5,000	
11. do. vessel	5,000	
		10,000
Ship Emma Jane, destroyed January 14, 1864.		
12. J. E. Donnell, vessel	4,000	
13. Magoun & Clapp, "	10,000	
14. do. "	10,000	
15. C. C. Duncan "	5,000	
		29,000
Bark Golden Rule, destroyed January 26, 1863.		
16. Ribon & Munoz, cargo		9,020
Ship Highlander, destroyed December 26, 1863.		
17. E. D. Peters & Co., vessel	15,000	
Do. freight	6,000	
		21,000
Ship John A. Parks, destroyed March 2, 1863.		
A. H. Howard, vessel	7,500	
Henry Cooper, Jr., "	3,938	
Walsh, Carver & Chase, advances	3,500	
		14,938

Bark Lamplighter, destroyed October 11, 1862.		
Bassett & Nickerson, freight		5,000
Ship Manchester, destroyed October 12, 1862.		
B. J. H. Trask, Jr., vessel & outfit		10,000
Bark Olive Jane, destroyed February 21, 1863.		
C. Dord & Co., cargo		800
Schooner Palmetto, destroyed February 3, 1863.		
C. & E. J. Peters, cargo		500
Ship Rockingham, destroyed April 23, 1864.		
William Jones & Son, freight		15,000
10 Bark Sea Bride, destroyed August 5, 1863.		
Rufus Green & Co., cargo	12,000	
Bassett & Nickerson, vessel & freight.	8,000	
Z. D. Basset, "	1,000	
William Currier, "	7,000	
Snow & Ryder, "	1,300	
		29,300
Ship Sea Lark, destroyed May 3, 1863.		
Samuel G. Reed, vessel	15,000	
Clark & Wilbur, cargo	3,388	
W. H. Taylor, "	332	
		18,720
Ship Senora, destroyed December 26, 1863.		
William Cushing, vessel		30,000
Ship Talisman, destroyed June 5, 1863.		
Wm. H. Fogg & Co., cargo	16,907	
Do. freight	2,595	
		19,498
Bark Tycoon, destroyed April 27, 1864.		
C. F. Dimon, vessel	3,375	
Do. freight	1,680	
H. Horstmann & Co., cargo	2,000	
Hall & Macomber, "	275	
J. C. Dayton & Co., "	4,855	
L. McMurray & Co., "	3,150	
Robert L. Taylor, "	4,500	
		19,835
Ship Winged Racer, destroyed November 10, 1863.		
Pacific Mutual Ins. Co., cargo		5,000

The Florida.

Ship Anglo Saxon, destroyed August 21, 1863.	
E. Mott Robinson, vessel	7,000
Ship Avon, destroyed March 29, 1864.	
Flint, Peabody & Co., insured by Glidden & Williams. cargo	7,000

Ship Commonwealth, destroyed April 17, 1863.			
R. Marcher & Bros.,	cargo	428	
Dunbar & Colby,	"	5,000	
Do.	primage	2,000	
Do.	freight	10,000	
			17,428
11 Ship Crown Point, destroyed May 13, 1863.			
Henry Cook,	vessel	10,000	
do.	freight	5,000	
Dunbar, Hobart & Co.,	cargo	2,162	
L. McMurray & Co.	"	900	
Newstadler Brothers,	"	4,100	
L. P. Rose,	"	621	
Clark & Wilbur,	"	4,516	
Holmes, Goodwin & Co.,	"	7,250	
			34,549
Steamer Electric Spark, destroyed July 10, 1864.			
Pacific Mutual Ins. Co.,	cargo	40,000	
J. R. Basset,	"	900	
			40,900
Bark Golconda, destroyed July 8, 1854.			
Isaac Howland, Jr., & Co.,	cargo		17,250
Bark Greenland, destroyed July 9, 1864.			
J. H. Kimball,	cargo		1,600
Bark Harriet Stevens, destroyed July 1, 1864.			
J. W. Munger,	cargo	9,500	
Brett, Son & Co.,	freight	1,000	
			10,500
Bark Mondamin, destroyed September 20, 1864.			
Thomas Whitridge,	vessel		10,000
Ship Oneida, destroyed April 24, 1863.			
I. S. Hathaway,	cargo	20,000	
Sun Mutual Ins. Co.,	"	10,000	
			30,000
Ship Southern Cross, destroyed June 6, 1863.			
Baker & Morrill,	freight	10,000	
New England Mutual Ins. Co.,	vessel	5,000	
			15,000
Ship Star of Peace, destroyed March 6, 1863.			
Charles Q. Hill,	freight and vessel		10,000
Brig William B. Nash, destroyed July 8.			
N. Regio & Co., (gold,)	cargo	4,000	
Manufacturers' Ins. Co.,	"	10,000	
Moore & Henry,	vessel	1,500	
A. H. Badger & Co.,	"	5,000	
			20,500

12 *The Shenandoah, After leaving Melbourne.*

Ship Brunswick, destroyed June 28, 1865.		
J. & W. R. Wing, catchings	1,000	
Do. vessel and outfit, see note below	4,000	
Henry A. Barling & A. H. Davis. do.	3,000	
		8,000
Ship General Williams, destroyed June 25, 1865.		
Williams & Barnes, vessel and outfit		22,500
Bark Gipsey, destroyed June 26, 1865.		
Henry A. Barling and A. H. Davis (Executors of E. M. Robinson), vessel and outfits		14,000
Ship Isaac Howland, destroyed June 28, 1865.		
Henry A. Barling and A. H. Davis (Executors of Edward Mott Robinson), vessel		16,500
Bark Isabella, destroyed June 26, 1865.		
H. A. Barling and A. H. Davis, vessel and outfit		3,500
		$575,043

Recapitulation.

The Alabama	$289,266
The Florida	221,727
The Shenandoah, after leaving Melbourne	64,050
	$575,033

13 *II. Motion to dismiss Petition for want of Jurisdiction. Filed May 28, 1883.*

The assistant attorney General on behalf of the United States moves the court to dismiss the petition in this cause for the reason that it does not disclose a cause of action within the jurisdiction of the court.

THOMAS SIMONS,
Ass't Att'y General.

III. Argument on and Submission of Motion to dismiss for want of Jurisdiction.

At a Court of Claims held in the city of Washington, on the sixth and seventh days of February, 1884, Mr. Blair for the United States was heard in support of said motion, and Mr. McDonald opposed, and the motion was submitted.

14 *IV. Opinion of the Court in the case of the Great Western Insurance Company vs. The United States. No. 13625. Filed also by the Court in this case, as embodying the grounds on which the Petition is dismissed.*

THE GREAT WESTERN INSURANCE COMPANY *v.* THE UNITED STATES.

On motion, DRAKE, CH. J., delivered the opinion of the court.

This is a motion to dismiss the following petition, for want of jurisdiction in the court to entertain it:

The petition of the Great Western Insurance Company showeth:

First. That the petitioner, the Great Western Insurance Company, is a corporation duly organized and established in accordance with the laws of the State of New York, and having its principal place of business in the city, county, and State of New York, and that it is duly authorized to make insurance upon all matters appertaining to, or connected with, marine risks or transportation.

Second. That at sundry times, for a valuable consideration, said petitioner did make insurance and issue policies upon various vessels, cargoes, and freights set forth in Schedule "A," hereto annexed and made part of this petition; said insurance covering risks of capture or seizure, restraint or detention, or the consequences of any attempt thereat, by or under the authority of the so-called Confederate States, or any one or more of the seceding or revolting States of the United States.

Third. That the said several vessels named in said schedule "A" were severally captured or destroyed by the so-called Confederate privateers Alabama and Florida, by said vessels respectively, at the dates and times, as set forth in schedule "B" hereto annexed and made part of this petition.

Fourth. That the petitioner did at sundry times, and in pursuance of its contracts of insurances, as heretofore set forth; pay to citizens of the United States losses arising from the capture or destruction of said vessels, to the amount upon the said several vessels, as set forth in schedule A hereto annexed and made part of this petition, to the parties entitled thereto, and amounting in the aggregate to the sum of $309,635; that in each and every case the money so paid was paid to American citizens, and the payment in each and every case of loss set forth in said schedule was less than the value of the property captured or destroyed as heretofore alleged.

Fifth. That upon payment of the aforesaid losses, as heretofore set out, each and every party to whom such payment was made assigned to the petitioner his rights to recover for such capture and destruction from any and all persons and governments whatsoever. The petitioner further avers that in consequence of its payment of the losses heretofore set forth, it became, independently of said assignment, subrogated to the rights of the assured in the aforesaid vessels, and thereby became entitled to demand and recover from any person or government liable for such losses full payment therefor, to the extent of its payments and interest thereon.

Sixth. That the kingdom of Great Britain by the laches of Her

Britannic Majesty's Government in permitting the so-called Confederate privateers, Alabama and Florida, to escape from its ports, did incur obligations and become liable for the payment of the losses accruing by reason of the capture or destruction of the vessels or cargoes heretofore specified, by the aforesaid Alabama and Florida, to the owners of said vessels and cargoes and to their assigns.

Seventh. The petitioner made claim as aforesaid against the Government of Great Britain, and in obedience to a request from the Department of State, dated Washington, September 22, 1865, requesting citizens of the United States having claims against foreign governments not founded on contract to forward to said Department statements of the same under oath, accompanied by proper proof did furnish full and detailed statements, in accordance with the rules of said Department, appended to said request of its aforesaid claim against the Government of Great Britain, and did request the said United States to present said claims against Her Britannic Majesty's Government and demand payment therefor for the benefit of the petitioner.

Eighth. That the United States did present said claims of
15 the petitioner with those of many other citizens and other
similar claims to Her Britannic Majesty's Goverment, and together with proof thereof, as furnished by your petitioner, and that the amount of said claims and of the liability of Her Britannic Majesty's Government therefor was duly considered by a Tribunal of Arbitration sitting at Geneva, the claims of your petitioner being presented and urged by the duly accredited agents of the United States to said tribunal.

Ninth. That said tribunal did, on or about the 14th day of September, 1872, award as its judgment and opinion a sum in gross and the cancellation of all claims upon Great Britain considered and allowed by said tribunal, amounting to fifteen million five hundred thousand dollars ($15,500,000), the payment by Great Britain and the acceptance of said sum by the United States to be the surrender and extinguishment of all claims upon the Kingdom of Great Britain and Her Britannic Majesty's Government for all losses growing out of the various matters which had been presented for the consideration of said tribunal, both on the part of the United States and its citizens. The petitioner avers that its claims, as heretofore set forth, were included among these claims.

Tenth. That Her Britannic Majesty's Government and the Kingdom of Great Britain acted on and accepted the judgment and report of said tribunal, and on or about the 26th day of May, 1873, appropriated the necessary money, and in September of the same year paid over in satisfaction and extinguishment of its liability by reason of the claims aforesaid, said sum of fifteen and one-half million dollars to the United States, and the same was received by the Secretary of State of the United States, and during the fiscal year ending June 30th, 1874, was invested in the five per cent. Funded Loan of 1881, and a registered bond therefor was issued to the Secretary of State in trust.

Eleventh. That prior to March 31st, 1877, portions of said fund had been used in payment and settlement of the claims of individuals presented by the United States as aforesaid, and included in said sum of fifteen million five hundred thousand dollars, but that on that day the balance of said bonds, amounting to nine million five hundred and fifty-three thousand eight hundred dollars ($9,553,800), including interest at five per cent. up to that date, were cancelled and destroyed and the value thereof covered into the Treasury of the United States, and that said amount, together with the sum of twenty-two thousand three hundred and fifty dollars and eighteen cents ($22,350.18), being a premium on the sale of bonds over and above the amount theretofore paid to other claimants, which was also at that date covered into the Treasury, constitute a fund now in the Treasury of the United States and undistributed, for the purposes for which it was awarded and paid by Great Britain as aforesaid, of nine million five hundred and seventy-six thousand one hundred and fifty dollars and eighteen cents ($9,576,150.18), without reckoning any interest thereon since the first day of March, 1877. That, as your petitioner is informed and verily believes the claims of your petitioner presented in its behalf by the United States as aforesaid, and which were allowed as forming a part of said sum of fifteen million five hundred thousand dollars, with the interest allowed thereon, amounting in the aggregate to four hundred and seventy-one thousand four hundred and nineteen dollars and twenty-nine cents, and that by force of the payment by Her Britannic Majesty's Government as aforesaid to the United States, the claim of your petitioner to that amount against the Kingdom of Great Britain and Her Britannic Majesty's Government was cancelled and discharged, and that thenceforth the claim of the petitioner for its losses as aforesaid to that amount became a claim against the United States, and the United States, by reason of its presentation of said claims to the Government of Great Britain, and its acceptance of said sum of fifteen million five hundred thousand dollars ($15,500,000), in cancellation and discharge of Great Britain from its liability for such claims as the United States had presented to it, thereby became the trustee of this petitioner to the extent aforesaid, and liable to pay to it said sum of four hundred and seventy-one thousand four hundred and nineteen dollars and twenty-nine cents ($471,419.29), together with such interest as it might receive upon said trust fund.

Twelfth. That of the interest accruing upon said trust fund up to the time of its being covered into the Treasury, March 31st, 1877, the proportionate share of your petitioner is seventy-five thousand five hundred and forty-six dollars and fifty-one cents ($75,546.51.)

Thirteenth. That the Government of the United States refuses, and at all times has refused, to pay or to make any provision for the payment of the claims of your petitioner in the premises, either of the sum of three hundred and nine thousand and six hundred and thirty-five dollars ($309,635), its original claim, without interest, against Her Britannic Majesty's Government, the sum of four hundred and seventy-one thousand four hundred and nineteen dollars and twenty-nine cents ($471,419.29), being the amount as allowed, with interest, and paid by Her Britannic Majesty's Government to the

United States for the use and benefit of your petitioner in September, 1873, as aforesaid, or the sum of five hundred and forty-
16 six thousand nine hundred and sixty-five dollars and eighty cents ($546,965.80), the amount of said last-mentioned sum, with interest accruing thereon at five per cent., covered into the Treasury March 31st, 1877.

Fourteenth. That your petitioner, the Great Western Insurance Company, and each and every one of its stockholders, have at all times borne true allegiance to the Government of the United States, and have not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government.

Fifteenth. The petitioner further states that there has been no assignment or transfer of its said claim, or any part thereof, or interest therein; and that said claimant is justly entitled to the amount claimed from the United States, hereinafter allowing all just credits and offsets, and that it believes the facts as stated in this petition to be true.

Sixteenth. That by reason of the premises there is justly due to your petitioner from the United States the sum of five hundred and forty-six thousand nine hundred and sixty-five dollars and eighty cents ($546,965.80), as aforesaid, with interest from March 31st, 1877.

Wherefore your petitioner prays judgment against the defendant for the sum of five hundred and forty-six thousand nine hundred and sixty-five dollars and eighty cents ($546,965.80), with interest from the 31st day of March, 1877.

We have set out the petition at large in order that its exact terms may appear in full; but the case can be substantially stated in a few words.

The treaty of Washington, of May 8, 1871, between Great Britain and the United States, authorized a tribunal of arbitration, to which should be referred "all the claims growing out of acts committed by the aforesaid vessels, [Alabama and Florida], and generically known as the 'Alabama claims.'"

Among the claims which went before that tribunal were those of the present claimant for losses to the amount of $309,635 paid on twenty vessels it had insured, and which had been destroyed by the Alabama and the Florida.

The tribunal of arbitration awarded nothing on any individual claim, but a gross sum of $15,500,000 to be paid to the United States "for the satisfaction of all the claims referred to the consideration of the tribunal," and that sum was paid by Great Britain to the United States.

The claimant demands payment of its losses out of that money, asserting that the United States, in presenting its claim before the tribunal of arbitration, acted as its agent, and in receiving the amount of the award became its trustee to the extent of the amount of its losses; and therefore that the United States have received so much money for its use and benefit.

The claimant admits that its right to demand payment of its claim out of that money was subject to the authority of Congress to hold the money as a separate fund, set apart from all other funds, and to subject the same to a course of administration for the purpose of applying it to the claims entitled thereto. While the money was invested in United States registered bonds, in pursuance of the act of March 3, 1873, (17 Stat. L., 601, ch. 261), and while the first Court of Commissioners of Alabama Claims was in existence, the claimant concedes that it had no right to sue in this court; but that its right to sue here accrued when that court ceased to be, and the bonds in which the money was invested were cancelled, and so much of the money as remained was covered into the Treasury.

The motion to dismiss presents the question whether this court can, under the laws defining its jurisdiction, take cognizance of such action. We have not been able to find anything to authorize it.

The petition seems to us to proceed upon an entirely erroneous
and indefensible view of the relations between the Govern-
17 ment and the citizens of the United States, in reference to the
matter of the claims of the latter against foreign governments.
It assumes that when that Government seeks from another government reparation for injuries to a citizen of the United States, it thereby becomes the agent of the citizen.

If this be true, then it necessarily follows that the Government derives from the citizen the power to act as his agent, is subject to the citizen's instructions, is liable to revocation of its authority by the citizen, and is accountable to the citizen for the due exercise of its agency.

When it is remembered that the National Government, not only at home but over the whole earth, embodies, represents, and wields the sovereignty of the American nation, so far as authorized by the Constitution of the United States; and that when it speaks to or treats with another nation it does so in no character but that of a sovereign, and is not known nor would be recognized in any other, it seems quite impossible to conceive of there being underneath its apparent sovereignty an agency for a man or a company of men, to whom it is to look for authority and instructions, and to whom it may become answerable in court on an implied *assumpsit* for money had and received in its sovereign capacity from another sovereign.

It seems to us to be equally impossible to hold the United States to be a trustee for any one when it receives a sum of money from a foreign government, paid in pursuance of a treaty, for the satisfaction of claims of American citizens against such government, unless the trust is declared and created by the terms of the treaty or by an act of Congress. As between the United States and an individual there can be no such thing as an implied or constructive trust, irrespective of written law.

We do not mean to affirm that under no circumstances could the National Government become an agent of or trustee for an individual; but that it cannot become such except by a law made conformably to the Constitution, either by the treaty-making or the legislative power. As no such law exists in regard to the money paid by Great Britain under the treaty of Washington, the United States cannot be considered as either an agent or trustee for the claimant.

So far from that the United States never had any relation whatever to private claims against Great Britain, or to Great Britain, except that of a sovereign State.

When those claimants invoked the aid of the National Government, in reference to their reclamations on Great Britain, they sought an exercise by that Government of the sovereign power through which alone this nation speaks to and acts upon other nations.

When the National Government urged upon Great Britain the demands of American citizens on account of the depredations of the rebel cruisers, those demands became reclamations by the sovereignty of this nation against the British sovereign, and passed out of the region of mere private right into the domain of international law, and out of the hands of the citizen into those of his Government.

When they so passed the authority of the National Government over them became immovable and supreme, not only as between it and the citizen, but as between it and Great Britain. If not so, it was impossible for the United States to have treated honorably with Great Britain in regard to them, for it was Great Britain's
18 high and undoubted right to know that the United States had sovereign power, absolute and unimpeachable, to do what they saw fit in regard to the claims which were the subject-matter of the treaty, and that there was nothing behind to impair or weaken that power.

When the United States appeared before the tribunal of arbitration created by the treaty, they appeared not as an agent advancing private claims, but as a sovereign seeking satisfaction of its own demands for injuries done to its subjects; and when the tribunal awarded $15,500,000 to be paid to the United States, it was to the United States as a sovereign, "for the satisfaction of all the claims referred to the consideration of the tribunal;" and the United States received that sum, and gave aquittance therefor as a sovereign and not otherwise. Thenceforth there existed no private claims of American citizens against Great Britain for the depredations of the rebel cruisers; they were all obliterated by the act of the United States as a sovereign, in demanding and receiving satisfaction therefor. Nor were there, in law, any such claims against the United States. That sum was received by the United States in their sovereign capacity, unmixed, in law, with any private right, and unaffected by any legal obligation to pay out any part of it to any one. None of it could ever go out of the Treasury to any individual except "in consequence of appropriations made by law." If private claimants sought access to it for the payment of their claims, they could obtain it only through an act of Congress, to which body alone it belonged to say whether any, and, if any, what descriptions of the claims "generically known as the 'Alabama claims'" should ever be paid out of that money, and when, where, and how their payment should be authorized and provided for. No failure on the part of Congress to authorize payment of those claims, or any of them, could ever authorize judicial recourse against the United States in this or any other court.

But, inasmuch as the money was paid for private claims, and was a gross sum paid for all such claims, without mention of any individual one, there was a necessity for an official and authorative ascertainment of those which should be paid. It was the sovereign right of the United States, of their own volition, when and how they pleased, to provide, by law, for that ascertainment; and no such right could possibly exist elsewhere. From sovereign inaction or delay, from sovereign partiality or even injustice in selecting the claims to be allowed, there was no appeal, except to the conscience and good will of Congress. It was to every intent a case where without written law there could be no legal right.

The Congress, without unnecessary delay, met the wishes of those interested by passing, June 23, 1874, (18 Stat. L., part 3, p. 245, ch. 459,) an act for the creation of the "Court of Commissioners of Alabama Claims," "for the adjudication and disposition of the moneys received into the Treasury under the award of the tribunal of arbitration by virtue of the * * * treaty aforesaid." That court was revived and re-established by the act of June 10, 1882, (22 Stat. L., 98, ch. 195,) and is now in existence. The claimant now seeking relief here has never appeared as a suitor in that tribunal, because its claims does not belong to any description of demands which those acts authorized to be presented there, and hence its appeal to this court to take cognizance of its claim under our general jurisdiction of "all claims founded upon any contract, expressed or implied, with the Government of the United States." But we cannot entertain its appeal, for the plain and incontrovertible reason that the sovereign authority of the nation has created another tribunal for the investigation and adjudication of the "Alabama claims," so far as that authority wills to have them investigated and adjudicated; and, by so doing, has totally excluded from all other tribunals or authorities any right to take official action upon the allowance of any claim on the money received by the United States under the treaty. It matters not that Congress did not open the door of that court wide enough to let this claimant in: that was for Congress to do or not as it saw fit; and we are not here to sit as a court of appeals from the decision of that body, in a matter in which its power is supreme and we have none at all.

The motion to dismiss the petition is sustained.

19 *V. Judgment of the Court.*

JOHN P. PAULISON, Surviving and Sole Receiver of the Columbian Insurance Company,
vs.
THE UNITED STATES.
No. 13626.

At a Court of Claims held in the city of Washington on the 18th day of February, A. D. 1884, judgment was ordered to be entered as follows:

The chief justice announced the decision of the court, and it was ordered that the petition of the claimant be dismissed upon the grounds stated in the opinion read in the case of the Great Western Insurance Company.

20 *VI. Application for allowance of appeal to the Supreme Court of the United States and order allowing same.*

JOHN P. PAULISON, Surviving and Sole Receiver of the Columbian Insurance Company,
vs.
THE UNITED STATES.
No. 13626.

From the judgment rendered in the above-entitled cause on the 18th day of February, 1884, on motion of the assistant attorney general, in favor of the United States, the claimant, by its attorney, on the 25th day of March, 1884, makes application for and gives notice of an appeal to the Supreme Court of the United States.

JOHN McDONALD,
Attorney for Claimant.

Filed March 25, 1884.

And now, to wit, March 25, 1884, it is ordered by the court that the appeal be allowed as prayed for.

21 In the Court of Claims.

JOHN P. PAULISON, Surviving and Sole Receiver of the Columbian Insurance Company,
vs.
THE UNITED STATES.
No. 13626

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the opinion of the court, of the judgment of the court, of the application of the claimant for the allowance of an appeal to the Supreme Court of the United States, and of the order of the court allowing the same.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court of Claims at Washington City, this 29th day of March, A. D. 1884.

[SEAL.]

JOHN RANDOLPH,
Asst. Clerk Court of Claims.

[Endorsed on cover:] Court of Claims. No. 836. John P. Paulison, surviving and sole receiver of the Columbia Insurance Company, Appellant, *vs.* The United States. Filed 12th April, 1884.

112-193

Supreme Court of the United States.

The Great Western Insurance Company,

APPELLANT,

vs.

The United States.

BRIEF OF APPELLANT.

E. Y. BELL,
Attorney for Appellant.
A. J. WILLARD,
Of Counsel for Appellant.

WASHINGTON, D. C.
C. W. Brown, Printer, 923 F Street, N. W.
1884.

Supreme Court of the United States.

THE GREAT WESTERN INSURANCE COMPANY,
APPELLANT,

vs.

THE UNITED STATES, APPELLEE.

BRIEF FOR APPELLANT.

GENERAL FACTS.

The events that gave rise to what are known as the "Alabama claims" are part of general history, and thus subjects of judicial knowledge. The property captured or destroyed by the confederate Cruisers, Alabama and Florida, upon the high seas, included that in respect to which the appellant makes claim. These vessels were ships of war owned by, and sailing under the flag of the confederated states then engaged in war with the United States, and were used for belligerent purposes. That war, while in substance a rebellion of certain confederated states against the sovereignty that had rightfully been exercised over them by the United States, was in form a war between governing communities, and had been formally recognized as such and notified to foreign powers. According to the principles of the international law, it was within the competency of any foreign state to unite itself with either of the belligerents, and thus to participate in the direct conseqnences of the state of war, or to remain neutral, as it regarded the contest. While a foreign state abstained from conduct inconsistent with neutrality, it was entitled to be regarded as a neutral, and to have its territory, property and citizens respected by the belligerents. On the other hand, if any foreign state participated knowingly with either of the belligerent states in operations incident to the state of war it was, according to the principles of international law, liable to be treated by the other as a public enemy.

Great Britain afforded to the Confederate states facilities for putting afloat these vessels in a condition to commit depredations on the commercial marine of the United States. Such culpability was charged by the United States against Great Britain, and was formally adjudicated against Great Britain under the provisions of the Treaty of Washington. The circumstances attending the outfit and the operations of these cruisers show that they were intended to capture or destroy the property of private citizens of the United States upon the high seas in order to destroy the commerce and cripple the resources of that government. The attitude of Great Britain must then be regarded as that of complicity with the public enemy of the United States in an effort to capture and destroy the property of citizens of the United States as a means of inflicting general injury upon that government. The wrong of Great Britain was directed immediately against citizens of the United States having property on the high seas exposed to the accidents of war, and indirectly to the resources of the United States government.

The conduct of Great Britain opened to the United States two courses of action, either to treat that nation as an ally of the confederated states, and to extend the operations of war to reach her, as a public enemy, or to demand reparation for the specific acts of wrong performed. The latter of these courses was chosen by the United States, and diplomatic intercourse opened with that view.

The United States very properly regarded the wrong committed by Great Britain as of a two-fold character, first, as against the citizens who suffered by the cruisers to which her culpability extended, and, second, as against the government and people of the United States at large, and in this dual character presented its demands against Great Britain.

For the purpose of formulating the demands of the United States against Great Britain, the former government called upon its citizens who had suffered loss through the operations of the cruisers, to which it was claimed that the culpability of Great Britain extended, to present such claims in form. Large numbers of claimants responded to this demand, and lodged with the State Department their claims and evidences. Among such claims those of the appellant, subsequently presented in the Court of Claims, and the subject of the present appeal, were included. The appellant claimed in the character of an insurer who had indemnified the assured for the capture and loss of their property on the high seas by the cruisers Alabama and Florida, having indemnified the assured as for a total loss. The appellant claimed that it was entitled to enforce for its indemnification the claims that originally belonged to the owners of the property captured and lost, and also exhibited assignments of their claims from the former owners, placing it in the attitude of the legal owner of such claims. The demands of the appellant were recognized as such by the Government of the United States, and were presented, specifically, to the Government of Great Britain as part of a class of similar claims presented, in part, by owners of property captured and lost, and, in part, by insurers of such owners.

In addition to the claims of private citizens thus presented, the Government of the United States preferred a claim for general damages that need not be specifically stated. The general diplomatic intercourse growing out of these demands resulted in the Joint Commission that formulated the Treaty of Washington. That the claims of private citizens constituted one of the items of demand to which the Treaty of Washington related appears from the protocol of the thirty-sixth conference. (Papers relating to the Treaty of Washington, Vol. I, p. 9.)

The leading object of the Treaty of Washington was the creation of a tribunal to adjudicate the claims thus presented by the United States for damages to private citizens and to the public interests at large. The question of the liability of Great Britain, both on account of injuries done to private citizens and to the Government and people of the United States, was left solidly to the tribunal created by that treaty, to be adjudged under the rules of international law and under certain rules prescribed by the treaty as part of the law of the case. The treaty left it to the tribunal either to award a gross sum covering all classes of damages awarded, or to ascertain the basis for the adjudication of such claims, leaving to another tribunal, provided for by the treaty and termed a board of assessors, to ascertain the damages in particular cases upon such basis. It will be observed that the powers and duties of the board of assessors are, by the treaty, adjusted to the hearing and decision of separate and independent claims, while the provisions in regard to the time and mode of their presentation and the payment of awards made upon them are adjusted to the same idea; namely, to that of a class of demands made by separate and independent persons for damages resulting from the action of Great Britain, having a common relation to all such demands.

It may be affirmed that the tribunal instituted under the Treaty of Washington was thus created for the purpose, in the first place, of ascertaining the culpability of Great Britain as it regards the depradations committed by certain Confederate cruisers; and, secondly, to ascertain, in the event that such culpability was established, what damages had been sustained by private citizens, and what damages, if any, had resulted to the Government and people of the United States at large in consequence thereof.

The case presented to the tribunal at Geneva conformed to the nature of the demands that had been pressed upon Great Britain, through diplomatic channels, urged upon the

Joint Commission, and provided with a tribunal by the Treaty of Washington. The case of the United States contains the following language: "The claims for direct losses growing out of the destruction of vessels and their cargoes may be further subdivided into: 1. Claims for destruction of vessels and property of the Government of the United States. 2. Claims for the destruction of vessels and property under the flag of the United States. 3. Claims for damages or injuries to persons growing out of the destruction of each class of vessels. In the accompanying Volume VII the tribunal will find ample data for determining the amount of damage which should be awarded in consequence of the injuries inflicted by reason of the destruction of vessels or property, whether of the Government or of private persons."

Upon consulting volume VII, referred to above, it will be found that the claims of the appellant were included among those presented by the Government of the United States as demands against the government of Great Britain to the Geneva tribunal. These claims are there set forth in detail, the appellant being named as a claimant, the character in which the claims are made, namely, as an insurer, is definitely stated, and the amounts claimed given in full and exact terms.

It is of interest and importance to observe the steps by which the questions presented to the Geneva tribunal, at first complex, became simplified, and resolved into an inquiry into the existence of private demands for injuries sustained by the hostile action of Great Britain. The first important conclusion reached by the tribunal excluded from its consideration all claims for indirect lossss. (Papers relating to Treaty of Washington, vol. 4, p. 22.) By this decision the question was narrowed down to the consideration of the direct losses incident to the capture of vessels and their cargoes.

The next question decided related to the Confederate cruisers, for which Great Britain should be held responsible, and restricted the culpability of that government to the cases of the cruisers Alabama and Florida and their tenders, and the Shenandoah after leaving Melbourne.

The further simplification of the questions at issue was effected by the modification of the claims on the part of the United States intended to be conformed to the points decided by the tribunal, and which is expressed in the revised tables presented by the agent of the United States. (Papers relating to Treaty of Washington, vol. 4, pp. 41 and 42.) In these tables the amount demanded on account of private claims, independent of prospective profits on interrupted voyages, is stated at $14,437,143.51. The claims for prospective earnings were stated at $4,099,302.50, and the amounts demanded by the United States for the expenses caused to its public marine by the cruisers in question was $6,735,062.49.

The rejection by the tribunal of claims for expenditure incurred in the pursuit of cruisers and of the claims for prospective profits, would appear to have removed from the consideration of the tribunal the amounts claimed in excess $14,437,143.51.

By the final conclusion of the tribunal the sum of $15,500,000 was awarded as a gross sum to the United States in full of all claims of the United States against Great Britain by reason of the matters complained of.

The award sets forth the principles on which the sum awarded was computed, namely, the rejection of the claim of the United States for indemnification for the costs of the pursuit of Confederate cruisers, of the claims for prospective earnings, of double claims, and of claims for "gross freights," that exceed "net freights." Applying these principles to the tables presented by the respective Governments, it is apparent that all the amounts demanded by the United States in behalf of owners and insurers by reason of the loss of vessels and cargoes were allowed in full with interest on such amounts. This conclusion would include the further conclusion that the specific claims made by the appellant were allowed and embodied in the gross sum of $15,500,000.

The payment by Great Britain to the United States of the sum awarded created new features in the relationship between the last-named Government and the claimants whose individual losses had been the means by which the United States had become possessed of that sum. The changes in these relationships down to a point where the appellant conceived itself entitled to present a petition to the Court of Claims, based on the general facts already stated, will be treated hereafter.. In the present preliminary stage of the discussion it may he stated that until the 31st of March, 1877, the United States held the fund derived from the source indicated as a trust fund, separate and apart from its general funds, and maintained a tribunal for its application to a class of cases from which, however, the claims of the appellant and all of a similar nature were excluded. On the day last indicated the fund was broken up in its specific character, and the moneys remaining undisposed of covered into the Treasury of the United States and the appellant left without any special means of prosecuting his demand; and in this condition we contend that a right to prosecute the demand in the Court of Claims arose. Such a proceeding was commenced and final judgment rendered in such court against the appellant, from which decision this appeal has been taken.

THE PETITION.

The petition filed in the Court of Claims sets forth the corporate character of the appellant as an insurer of marine risks; the issuing of policies "covering risks of capture or seizure, restraint or detention, or the consequences of any attempt thereat, by or under the authority of the so-called Confederate States," &c., upon vessels that were captured or destroyed by the Confederate "privateers" Alabama and Florida; the payment of losses arising from the capture or destruction of said vessels to American citizens, and the taking upon such payment of an assignment from the assured of his right "to recover for such capture and destruction from any and all persons and governments whatsoever," and a right to be subrogated to the rights of the assured in the premises.

The petition then alleges the negligence of Great Britain in permitting the escape of the cruisers Alabama and Florida, and the liability of that government for losses accruing by reason of the capture or destruction of vessels by such cruisers. That by the request of the Government of the United States the claimant presented to the Department of State "statements of the same under oath, accompanied by proper proof," and furnished full and detailed statements in accordance with the rules of said Department and requested the Government of the United States "to present said claims against Her Brittanic Majesty's Government and demand payment therefor for the benefit of the petitioner."

The petition further alleges the presentation of said claims to the Government of Great Britain by the Government of the United States with the proofs, and the consideration of such claims and proofs by the Tribunal of Arbitration, sitting at Geneva, the same being presented thereto by the duly accredited agent of the United States. It alleges the award and payment, and the acceptance of the same by the United States as an extinguishment of all claims upon the Kingdom of Great Britain for all losses growing out of the various matters submitted to said tribunal, including the claims of the petitioner.

The petition further alleges the creation of a specific fund, constituted of the proceeds of said award and payment, and that such fund was broken up on the 31st of March, 1877, and the proceeds thereof covered into the Treasury of the United States to the amount of $9,576,150.18. The claim of the petitioner as presented, allowed and paid to the United States is stated at $471,419.29, and is alleged to have been cancelled thereby as against Great Britain and made chargeable against the United States. The proportionate share of the petitioner in the interest accrued upon the fund at the time of being covered into the Treasury is stated at $75,546.51, and is claimed. The refusal of the United States to pay the petitioner's demand is alleged. The petition sets forth the allegation as to allegiance, that there has been no assignment of its claim, its right to the amount claimed, and its belief of the truth of the facts stated therein, and claims judgment for the sum of $546,965.80. The petition was duly vertified and set forth ~~in~~ in accompanying tables the vessels and cargoes captured or destroyed, and the amounts paid in satisfaction of the insurance thereupon.

MOTION TO DISMISS PETITION.

Upon the filing of the petition the Attorney General, in behalf of the United States, moved its dismissal, and the Court of Claims granted such motion dismissing such petition.

JUDGMENT OF COURT OF CLAIMS.

The grounds assigned in the judgment of dismissal for that action of the court are stated to be those set forth in the opinion of the Chief Justice delivered in the case. It appears from the opinion in question that the petition was dismissed upon the ground that no cause of action against the United States was shown by it.

THE GENERAL QUESTION.

The general question arising on the face of the petition dismissed by the Court of Claims is, first, whether the United States received the fund in question to the use of the claimants, and appropriated the same to its own use; and second, whether such fact gives rise to an implied obligation to pay such amount to the claimants. If it appears that such an implied obligation exists, in harmony with the laws, then it is clearly cognizable by the Court of Claims, unless it is found to arise from or depend upon the stipulations of treaties with foreign nations or the Indian tribes, or unless it has been barred by the statute of limitations affecting the jurisdiction of the Court of Claims.

The general proposition advanced implies that the United States, although an independent sovereign, may be affected by an implied obligation as it regards its relation to an individual, a subject of its governmental authority. Independent of the provisions of law under which the Court of Claims takes its jurisdiction of demands against the United States, such an implied obligation, affecting the sovereign authority must be an imperfect obligation, as independent of such provisions it would lack one of the essential elements of a perfect obligation, namely—the means of its enforcement. The right of petitioning the legislative authority for the redress of individual wrong is not such a means of enforcing an obligation of the community as to confer upon such obligation the character of a perfect obligation, and independent of the remedy afforded by the jurisdiction of the Court of Claims, such a course would be the only one open to the citizen making a demand against the United States.

There is nothing in the act conferring jurisdiction on the Court of Claims tending to create any liability on the part of the United States in any case whatever. There is nothing to change the legal consequences of any dealing or contract relationship between the United States and one of its citizens from what they were antecedently to the passage of that act. It provides no new test or definition of liability on the part of the United States. It assumes that antecedently to, and independently of, its provisions, the United States might incur obligations, both expressed and implied, in its relation to citizens, and its entire object is to clothe such obligatory relationships with the means of judicial enforcement, and hence it may be affirmed that the act in question is a recognition that the United States may, without the aid of positive legislation, become bound by an obligation lacking nothing essential to the legal idea of an obligation except the means of judicial enforcement.

The direct effect of the act creating the jurisdiction of the Court of Claims was to make an important change in the legal consequences of contract relationships between the United States and a citizen, in all cases falling within that jurisdiction. Prior to that act such relationships could only result in an imperfect obligation, so far as the United States was affected by it, although it might produce a perfect and enforcible obligation as it regarded the citizen dealing with the government. This inequality, conserved through political superstition and disregard of the principles of justice, was intended by the act in question to be done away with, as it regarded the class of cases falling within the jurisdiction of the Court of Claims. It is true that the act conferring jurisdiction on the Court of Claims may be regarded as possibly a mere temporary expression of the legislative will, capable of being displaced by the repeal or modification of the act, or by conflicting legislation, but while it stands its proper consequences must be attributed to it, and those consequences, it is respectfully submitted, are such as have just been described, namely, to place the legal consequences of contract relationships between the United States and a citizen, in the cases subjected to the jurisdiction of the Court of Claims on the same footing as those between private citizens.

It has already been said that the act creating the jurisdiction of the Court of Claims implies the existing and antecedent capacity of the United States to bind itself to a citizen by an imperfect civil contract, and, it may be observed that this is a necessary implication, inasmuch as without it the act would, in its whole scope, be inoperative; inasmuch as without that implication no case of an express or implied contract could exist to be brought within the jurisdiction of that Court. As the act imposes upon no transaction of the United States, the consequences of an obligation binding the Government, its purport leads to the necessary inference that antecedently to, and independent of, its provisions, such obligatory consequences might exist in the dealings of the Government with individuals.

To incur obligation is not inconsistent with the nature of sovereignty, but on the contrary, as the power of self-obligation, is the legitimate means of acquiring the possessions of others to deny that capacity to sovereign authority is to reduce it below the ordinary standard of individual potency. All international intercourse and international law are based on the idea that a sovereign state may incur obligations. As between states, the obligations of sovereignty may assume a perfect character; for although war is an imperfect means of redress, yet it stands recognized as based upon the principles of justice and a means of enforcement satisfying the idea of a perfect obligation.

If it is consistent with the nature of sovereignty to incur obligations in its intercourse with its sovereign equals, it is equally so in its dealings with its subjects. The only difference between the two cases lies in the fact that the subject has no means of compelling the will of his sovereign. To attempt such coercion on the part of an individual would be an act of rebellion that could have no recognition under the principles of the law as an act of justice. No right on the part of the subject towards his sovereign correlative to that of making war, incident to the relations between sovereigns, has legal recognition. If the sovereign by his laws removes this difference by conferring a judicial remedy upon his subjects for the enforcement of his obligations, the difference that has existed between the respective relations of sovereign to sovereign and sovereign to subject ceases, and both relationships produce obligations of a perfect character in legal estimation.

It may be concluded that in all contract relations between the United States and citizens in all cases within the cognizance of the Court of Claims, the same obligatory consequences follow that are properly incident to similar relations between sovereign and sovereign and between individual and individual. This conclusion, as has been seen, arises from a necessary implication from the act conferring jurisdiction on the Court of Claims, and from the principles of law common to all classes of obligations.

IMPLICATION OF CONTRACTS BINDING A SOVEREIGN.

In order fully to recognize the principles and rules that should be observed in the implication of a contract affecting the obligations of a sovereign, it is necessary that what is common to such contracts with all other classes should be noted, and that the peculiar conditions affecting that exceptional class should be studied.

Every contract containing a promise to do or forbear is a limitation of the antecedent liberty of the promising party, and thus contains the nature of law, and is, indeed, the private law of the parties, self imposed, and deriving its efficacy from the law of the land in virtue of its mutuality as an interchange of burdens and benefits. The interpetration and construction of the declarations and conduct of contracting parties is an effort to harmonize such declarations and conduct with the law of the land and the prevailing usages and habits of speech and action, both in general intercourse and in particular dealings of the special nature involved. The harmony between the law of the land and the private law of contract relationships demands that the latter should be consistent with the rules, forms, and principles of the common law, and with the positive or enacted law consisting of constitutions, statutes, and treaties.

That obligations assumed by the United States are to be tested by the rules and principles of the common law is not only a consequence of the nature of contracts, but a proposition embodied in all the decisions made by this court involving questions of that nature. The principles involved in harmonizing the contract obligations of the United States with the law promulgated in the form of constitutions, statutes, and treaties has not been so fully elucidated by this court, and needs consideration.

That which constitutes the exceptional feature of contracts made between a sovereign and his subject is the fact that the sovereign is at once the source of the particular obligation and of the positive law of the land by which its efficacy is to be tested. As the conception of a sovereign is that of an unlimited lawgiver, it is obvious that it is possible to sovereignty, at any time, to place its general laws out of relation to its particular obligations, and thus to defeat the latter or to repeal or modify any declaration, public or private, of its will and purposes.

Notwithstanding the possession of such power, if in fact the general laws are preserved in harmony with the particular engagements of the sovereign, and the latter are left unrepealed, all that is essential to the idea of a contract is present in contract relations between such sovereign and his subject. So long as every act performed by a sovereign, or under his authority, had the force of law, the conception that a sovereign might oblige himself to his subject possessed no practical value as the very act of refusing to perform his obligations would have the force of a law repealing it. It was only when the law-making function was separated from the executive function, and laws were promulgated in form, and especially when limitations of the legislative authority were recognized, that that conception assumed the form of a legal doctrine, and became of practical as well as of theoretical interest. It will be convenient to contrast, in this respect, the ancient and the modern conceptions of sovereignty as embodied in actual institutions.

EARLY CONCEPTIONS OF SOVEREIGNTY.

The early conception of sovereignty appears to have been that of a personal right to govern, in an unlimited manner the conduct of the subject of such authority. The idea of personal authority preceded that of public authority, and that of the right of the sovereign to govern, that of the right of the community to have laws suited to its condition.

Every act of the sovereign, or performed under his authority, has the quality and force of law. The will of the sovereign, whether promulgated in form or expressed merely in his action, possessed all the attributes of law, and as such, affected not only the relations of the subject to his sovereign, but the relations of the individual subject in all their intercourse and dealings with each other. It may be that this strict view of the character of soverignty was preceded, historically, by a milder conception derived from the parental relations, and ~~this,~~ as many suppose, ~~is~~ the predominance of this, military tendencies brought about so concentrated a conception of sovereign authority, yet that conception is found at the basis of our legal history, and is necessary to account for our early legal ideas.

In the early condition just referred to the idea of the rights, obligations and powers of the community was merged in that of the personal rights, obligations and powers of the sovereign. The community, the state and the person of the sovereign being identified as a single source of authority, the idea of obligacy attaching to the engagements of the public authority with the citizen could find no place among the recognitions or precepts of the law, as it could lead to no civil consequences of any certain value~~s~~, and was only capable of taking part in theoretical discussion.

PRESENT CONCEPTION OF SOVEREIGNTY.

The separation of the legislative and executive functions rendered possible a more advanced idea of the sovereign authority. The formal publication of laws, the natural outgrowth of such a distribution of the public functions, prepared the way for a legal recognition of a distinction between the action of the law-making power and that of the executive agencies of government. Sovereignty was conceived as giving rise to different functions, attended by very different legal consequences. The legislative function held the supreme expression of the sovereign will, to which all other functions of the Government were subordinated. The executive authority came to represent an active agency under the laws that could not alter them or transcend their authority. The judicial authority, another function of the sovereignty, was recognized as solely entitled to ascertain and establish the obligations and rights of the citizen under the laws. The establishment of legislative bodies, based upon popular representation, removed the idea of sovereignty from the agents of government to the community at large as a quality of the aggregate rather than of a person or office. The limitation of the legislative authority by means of constitutions, proceeding more directly from the electors, still further separated the idea of sovereignty from that of exercising governmental function.

The principles of the law have been adjusted to this advanced conception of the powers of government, and an act of the executive not having the sanction of the laws is no longer considered as proceeding from the sovereignty, but as a personal act that may be dealt with, as such, by the judicial authority.

If assent is given to the propositions already advanced it must be concluded that in order to raise by implication, a contract, to which a sovereign is a party, it must appear that the declarations and conduct of the accredited agents of the government, acting in the line of their public authority, have been such as would in the dealings between individuals give rise to such an implied contract. In other words, the conduct and declarations of public officials must for that purpose be interpreted and construed by the same principles and means that are applicable to dealings between private persons. It must also appear that the engagements thus assumed are in harmony with the existing laws—that is to say, that the contract, in order to be implied, must not conflict with either the common law or with the constitutions, statutes, and treaties having the force of law, existing at its formation.

It would seem to follow from what has been said that although an implied contract binding a sovereign may come into legal existence, yet that to maintain its efficacy the law, upon which it depends for its force, must be maintained in a condition harmonizing with the contract. This would imply that the laws may at any time be changed by the sovereign will in such a manner as to deprive the engagements of the sovereign, to his subject, of validity, in legal estimation. If the engagements of a sovereign are thus dependent upon the maintenance of laws in harmony with them, it is to be observed that at the present day only the promulgated laws such as constitutions, statutes and treaties can produce such an effect upon sovereign obligations. Executive action can produce no such effect, as the legislative function is that which, alone, can make and unmake obligations, whether binding the citizen or the State, and whether in the form of general laws or of specific requirements or engagements. The laws commonly repose in executive officers, especially in those clothed with the highest powers, a discretion more or less limited, the exercise of which is attended by legal consequences similar to those that attend the exercise of the law-making function, but as this discretion, in the hands of executive officers, is a delegation from the law-making authority, the reason of this fact is apparent. As applied to conditions existing in the United States, the propositions just advanced would lead to the conclusion that a contract cannot be implied affecting the obligations of the United States unless the constitution, statutes and treaties are consistent with such implication at the time it should arise, and that such implied contract although coming into existence cannot at any subsequent time be affirmed as obligatory unless at such time such constitutions, statutes and treaties are consistent with it.

It will not be necessary for the purpose of the present case to examine the proposition that places it in the power of the law-making authority to dissolve the engagements of the United States with its citizens as the position is assumed in regard to the implied contract in suit that no exercise of the legislative power hostile to it has been made.

GENERAL PROPOSITION OF LAW COVERING THE CASE.

We are enabled from what has gone before to propound as the law of this case the following proposition: If it appears by the petition read with those matters pertinent to it, of which this Court can take judicial notice, that the declarations and conduct of the accredited executive officers of the government in the case disclosed as interpreted and construed by the rules and principles of the law common to contracts at large and within the legal authority of such officers, imply an obligation of the nature set forth in the petition, and such obligation was at its creation consistent with the constitution, the statutes and treaties of the United States, and remains in that condition of consistency, then the petition discloses a cause of action within the competency of the Court of Claims, unless it can be affirmed that it grows out of, or is dependant upon the stipulations of treaties with foreign governments or with the Indian tribes, and if that fact cannot be affirmed, and the claim is not barred by lapse of time, judgment of the Court of Claims is erroneous and should be set aside.

The proposition just submitted, as we believe, embodies the conclusions of this Court in many judgments rendered by it, and in the reasons assigned for such judgments, and presents, according to our views, the only means of reconciling the unlimited nature of sovereign authority with the principle that a sovereign may incur obligations recognizable in accordance with the rules and principles of the law. We propose to examine the state of facts and law disclosed by the petition under the general proposition just stated, and submit our positions in the form of twelve propositions. The substance of these propositions is, that the official declarations and conduct of the accredited agents of the United States, interpreted and construed by the principles and rules of law, and the Constitution, statutes and treaties of the United States, disclose the fact that the United States has received a known and definite sum of money to the use of the appellant, and on demand has refused to pay it as due, and that no action of the law-making power, tending to impair the obligation of the United States in the premises has taken place. We will proceed to state and discuss the propositions upon which we rely as it regards the portion of the case thus indicated.

FIRST PROPOSITION.

That claimants and certain persons, the security of whose property upon the high seas they had guaranteed as insurers, and whose rights in the premises they have acquired, possess, and are entitled to enforce, held valuable claims against the Kingdom and Government of Great Britain for damages sustained by reason of the capture and appropriation, or destruction, of such property, on the high seas by public enemies of the United States engaged in making war against the United States, in complicity with the said Kingdom and Government of Great Britain, such damages being the consequence of a breach of neutrality, relative to said belligerency, on the part of Great Britain and of the complicity aforesaid.

That said claims were valid and binding on Great Britain, and were known and recognized as such by the Government of the United States.

This proposition, after setting forth briefly the nature of the claims of the appellant against Great Britain, alleges the validity of these claims, and the fact that the United States possessed knowledge of their existence and recognized their validity. If the United States, by its action, is estopped from denying these facts, and the matter of such estoppel is contained in the petition, or is of a nature of which the court can take judicial notice, then not only is the petition sufficient as affirming the validity of such claims, but it is proved in a manner that leaves nothing for any future issue in the case.

We affirm that it is not material to the present case that we should show, affirmatively, that the claims of the appellant against Great Britain were such as could be regarded valid and binding on that government, in legal estimation, inasmuch as the United States are, under the facts disclosed by the petition, estopped from denying the validity of such claims. The facts upon which this position depends are as follows:

1st. The appellant brought to the notice of the Government of the United States certain claims made by it against Great Britain for alleged violations of international law, causing a damage and injury to property covered by its guaranty as an insurer, and the fact and extent of the damage sustained.

2d. The United States undertook to obtain from Great Britain indemnification for the losses of the appellant, presenting itself to Great Britain as a sovereign vindicating the claims of a citizen against that government.

3d. The United States agreed with Great Britain upon the establishment of a tribunal for the purpose, among other things, of adjudicating the validity of the claims of the appellant against Great Britain.

4th. The United States, by its accredited agent, presented the claim of the appellant to such tribunal, stating it in its nature, circumstances, and amount, and demanded indemnity on behalf of the appellant.

5th. The judgment of the tribunal affirmed the validity of the claim of the appellant in common with other claims of private citizens of the same class, and awarded a sum in compensation of such claims equal to the principal sum of all the damages claimed by all the claimants, who, under the principles adjudged, were entitled to any compensation, and increased that sum by interest, to be divided among them. Thus it may be affirmed that the claim of the appellant was established, and a sum awarded for interest on the damages, to be divided proportionately among the various claimants whose claims were established.

6th. The United States received from Great Britain the whole sum awarded.

If these propositions can be made good, the United States stands in the attitude of one who has assumed to prosecute the demand of another, with the assent of the latter, and for his benefit, and has received the amount so claimed, and has refused to pay the same over to him for whose benefit it was recovered. One standing in such an attitude is affected by the principles of agency, according to which principles, the agent having collected the debt of his principal cannot allege, as a just reason for refusing to pay it over, that the claim prosecuted by him in behalf of the principal had no legal validity. If such a claim had undergone adjudication as a means of its recovery the answer to such a ground of refusal would be that the judgment is conclusive as to the validity of the claims, and as binding all parties and their privies, that fact could not be denied as against its force.

The case supposed is the present case. The award estopped Great Britain from denying the validity of the claim, and the United States having procured this condition of things cannot affirm the contrary as a means of escaping the proper responsibility for its action. It is not essential to such consequences, as affecting the United States, that that government should have stood in the attitude of a technical agent to the appellant bound by the instructions of the latter, although the opinion of the Court of Claims is based upon such an idea. It is enough to know that the principles of agency are applicable to the case to find the reason for the conclusion stated. A trustee and a guardian are both affected by these principles, and would be estopped under the conditions stated; and yet neither of them is a technical agent in the sense of being subjected to control by those for whom they act. The responsibilities of a government acting in the behalf and interest of an individual are more closely assimilated to those of a guardian than either a technical agent or a trustee, and, obviously, if the principles of justice reach to a sovereign they produce the consequence that has been stated as it regards the estoppel in question.

It is not necessary to affirm that if the claims in question were an entire fabrication and a fraud upon the Government of Great Britain and the United States that the latter could not consistently with the principles of justice allege such fact as a reason for refusing a payment which would be, in effect, the consummation of the intended fraud. That case is not presented, and need not be considered. If there is any room to question the validity of the claims in suit it is only as to the bearing of the act of Great Britain upon the rights of the owner and insurer of property destroyed by causes attributable to her misconduct. It concerns alone the statement of the legal incidents of the relation between Great Britain and the claimant, and that is matter proper for determination in a judicial controversy upon the claim. The United States invited the judgment of the international tribunal upon that question by propounding, specifically, the claims of insurers as an element of damage, and they were adjudicated favorably for the claimant. The United States may not only, with dignity and honor, rest upon that decision, but in attempting to deny to the claimant its benefits, would occupy an attitude which, if assumed by a private person under like conditions, would be judicially declared one of fraud.

As the validity of the proposition, that the United States is estopped from denying the validity of the claims in suit, depends upon the correctness of the propositions already submitted for that purpose, it is important that their merits should be examined. The only feature of those propositions that is open to any dispute is that which affirms that the United States based its demand against Great Britain on the specific claims presented by the appellant and other private citizens seeking indemnification. If the United States had in its diplomatic intercourse on the subject, in the negotiation of the treaty of Washington, and in its proceedings before the tribunal made an indefinite claim for injuries done to American citizens at large; and even if it had named the vessels destroyed and estimated the loss generally or specifically, without naming the specific parties who were sufferers thereby, a very different case from the present one would have been presented. In that case it might be said that the United States was not urging individual claims for redress, but was merely seeking to create a fund to which such citizens as might conceive themselves entitled thereto might have recourse for redress. It may be conceded that the adjudication of a general damage alone, in such a case, could not be regarded as an adjudication of the right of any citizen entitled to have recourse to the fund. If in the case just supposed the United States should come into possession of a fund applicable to cases of loss through the destruction of vessels, cargoes and voyages, and should deny the right of an insurer, having paid as for a total loss to intervene in the right of the indemnified owner, although the government could be charged with the gross delinquency of refusing to conform to the same principles of justice that it, daily, metes out to private citizens in its courts, yet it could not be charged with being estopped from contesting such claims by the judgment under which it became possessed of the fund.

Very good reasons, as we may suppose, induced the Government to present the claims in an entirely different manner from that just supposed. The executive of the nation believed the claims of the insurers to be just, as well as those of the owners of ships and cargoes, and invited the presentation of such claims, accepted them, and presented them to Great Britain and to the Geneva tribunal. If there had been a possible doubt about the validity of the claims of insurers, there would have been a motive for covering the details of the claims under a general claim in behalf of the United States alone, but there was no such doubt, as is evidenced by the fact that the representatives of Great Britain not only did not deny the claims of insurers, but accepted such liability in principle and conformed their case to such position. By putting forth the specific claims of her citizens the United States evinced an intention of good faith, avoiding the possible inference that she was speculating for her own profit upon the losses of her citizens, and strengthened her claim for damages as the case rested on the sworn proof of private citizens, and not upon diplomatic utterances and official reports, and presented a fullness of detail and an appeal on the ground of private hardship that otherwise could not have been in so available a form.

The fact that the United States presented the claim of the appellant as the claim of a private citizen of that nation against Great Britain, advocated by the sovereign of that citizen, accompanied by proofs and estimates of damage is sufficiently stated in the petition, and in ordinary cases would be regarded as admitted by the motion to dismiss.

The Attorney-General, in the Court of Claims, contended that the petition should be read with the record containing the history of public events relating to the transaction brought to view. We assume that the same position will be taken in this court. We offer no objection to that course; but, on the contrary, invite the closest scrutiny of the public records of the period in question, believing that the more fully the question is examined the more profound will be the conviction, not only of the justice of our case, but of the importance of the duty imposed upon this court of saving the good name of our country from merited aspersion.

We would refer the court to certain documents published by the United States as part of the history of the events in question for convincing proof of the correctness of the assertions made by us as to the character in which the demand upon Great Britain was made.

In the book entitled "Claims of United States against Great Britain," Vol. VII, referred to in the case submitted by the United States as the statement of such claims, the various claims in suit appear, and will be recognized by comparison with the tables appended to the petition in the Court of Claims. In order to understand the manner in which such presentation was made, a single instance of loss will be brought to notice as representing the class. Volume VII sets forth two classes of claims in separate statements. First, those arising from losses incurred by the United States; and, second, those from losses by citizens. The note preceding the statements of the losses by citizens states that the persons named as sustaining losses stood in the attitude of "claimants." At page C of the last-mentioned statement the case of the ship "Wave Crest" is made, and an item is introduced as follows: "Great Western Insurance Company, New York, insures on cargo for F. F. Dufais, $22,800." Other items of loss in respect of the same vessel are stated, which, including that of the claim of the appellant, amount to the aggregate sum of $59,264.10.

If we turn now to the American tables presented with the argument of the counsel of the United States to the tribunal, appearing in the third volume of "Papers relating to the Treaty of Washington," we find, at page 597, added to this item of $59,264.10, the sum of $5,365 for wages and personal effects of seamen and others, making an aggregate of $64,629.10, which is claimed in behalf of the United States on account of the claims of citizens sustaining damages by reason of the matters complained of. In the American tables attention is distinctly called to the claims made by insurers. The object of these tables, as indicated by the headings of the columns, appears to have been to prevent confusion from arising from the duplication of claims by their presentation, first, on behalf of owners, and, second, by insurers upon the same property.

It must be concluded then that the statement of the petition, that the United States presented the claims of the appellant to the tribunal as the claims of a private citizen, that its nature as the claim of an insurer was set forth, and the damage, specifically stated and claimed, is not only not contradicted by matters of which this Court may take judicial notice, but is plainly corroborated by such evidences. It is true that the United States at the same time presented a claim for public damage, but the union of such claims was consistent with their being considered as independent elements. The United States so considered them and formulated them in such a distinct and separate manner that the damages claimed on each account could be distinctly discriminated and the disallowance of either class would permit the merits of the other class to be separately considered upon a full statement of the damage pertinent to it. The facility thus afforded by the mode in which the case of the United States distinguished between the claims of private citizens and those of the United States enabled the Court to disallow the latter class of claims and to proceed to judgment in the claims of private citizens.

If it is deemed important to the existence of the estoppel claimed by the appellant that it should be made to appear that the tribunal passed specifically upon the validity of the class of claims in question, that fact can readily be made to appear. It appears by the records, already referred to, that the case of Great Britain did not in any way dispute in principle the validity of the claims of the appellant nor of the class to which they appertain, namely, the claims of insurers of vessel, cargo and freight who had paid as for loss. This fact will appear in a convenient form for recognition by the examination of the British tables, appended to the 3d vol. of the "Papers relating to the Treaty of Washington."

The case of the vessel "Wave Crest" will again be used to illustrate the inferences from these tables. At page 618 (papers relating &c., vol. 3) the demand for losses on cargo is stated at $24,092, which with the other claims made in respect of this vessel, amount to the sum, in aggregate, of $59,264. This item corresponds with the claim made in vol. 7, the supplement to the case of the United States. Referring to vol. 7, p. C, it will appear that the items of $24,092, claimed for cargo, consisted of two claims, one made by the appellant for $22,800, and the other by Peter Rice

& Co. for $1,292.10. The British table, No. IV, p. 618, sets forth the aggregate claims for cargo, after deducting instances of double claims, at $1,831,075. In the explanations of the table last mentioned, that contains all the claims relating to merchant ships destroyed by the Alabama at p. 619, it is said "the sum of $1,831,076, in paper, is claimed for cargoes and profits, insurance and commission on these same cargoes, as well as for damages arising from the non-arrival at the port of destination, after the deduction of the double claims, which can be easily shown for ~~this~~ the moment. We have reduced this claim to $1,626,043, in paper, and we are able to show that this reduction is in all probability far from sufficient."

Into theis aggregate of $1,626,043, the claim of the appellant entered, as must be fairly concluded. In the first place no deduction was made from that claim on account of double claims, as appears distinctly by table IV. The total deduction made by the concession of $1,626,043, as claimed for cargo, is the sum of $205,033.

It will be observed that this reduction does not separate the item claimed for insurance from the aggregate claimed by the United States upon the idea that charges for insurance were not admissible. The aggregate claim contains this item, and the reduction is claimed from that aggregate without discrimination. An estimate of the amounts claimed for insurance on cargoes for the merchant vessels destroyed by the Alabama will show that the reduction left the claim for insurance admitted in principle.

It appears, then, that the claims of insurers for losses, after the indemnification of the assured, were admitted in principle by the British case, and that the deductions claimed related merely to matters of detail. Interpreting the award by this fact, as properly should be done, inasmuch as it was for the parties to make the case and the tribunal merely to decide, and inasmuch as the award presumptively follows the case submitted, and it must be concluded that the United States submitted the claim of the appellant, as the demand of a private citizen against Great Britain, and that the tribunal established the validity of such claim in principle, and made an award on that basis.

It is clear, then, that unless the United States are unaffected by the rules and principles of estoppel, they cannot be admitted to deny the validity of the claims in question upon a demand for the payment of their proceeds to the party to whose use they were received.

If it be said that a sovereign cannot be estopped from denying his liability, the force of that objection lies in the fact that independent of his assent he cannot be sued. When, however, a sovereign consents to be sued, not merely in terms implying a limited application to him of the modes of procedure usual in the cases of individuals, but in broad and unlimited terms, he declares his willingness to stand to his creditors with the same advantages and disadvantages that affect his adversary. To grant less would be unworthy of the dignity of a sovereign state.

We submit that, apart from the question of estoppel, this court will find no difficulty, should it become necessary in its judgment to do so, in affirming that the demand of the appellant against Great Britain has a recognizable legal character to which the idea of value could be ascribed. It was undoubtedly in the power of the United States to merge any injury that Great Britain inflicted upon a private citizen of the United States in a general state of war between the two countries. If war had arisen between the two nations on account of acts that gave rise to private injuries, whatever might be the end of the war or the conditions of pacification, the private claims connected with its cause would have disappeared. It would not be inappropriate to apply the term *merger* to the consequences of a state of war upon private demands thus situated. The United States did not elect to treat the conduct of Great Britain in the manner just indicated, but was animated by the wise policy of treating those acts from the standpoint of a pecuniary loss sustained.

As a question of pecuniary damage it was necessary to discriminate between the injuries inflicted upon the public interests and those affecting private individuals. As it regarded injuries inflicted upon the public interests, the United States could proceed as the injured party, while if the injuries inflicted upon individuals were to be pressed that government could stand in no other light than as exercising a sovereign guardianship over the interests of its citizens.

The proceedings of the United States were conformed to this idea, and the public and private claims were separately formulated, although presented together. The tribunal ignored the claims for public losses, and the course of adjudication was opened only to the cases of private losses. The United States had then an opportunity for determining for itself whether to take the position that the refusal of the tribunal to entertain the claims for public injuries was a refusal to enter upon the course of procedure pointed out by the treaty of Washington, or to accept the conclusions of the tribunal and proceed with the case as one of damages to private citizens alone. The course adopted by our government sanctions the conclusion of the tribunal and reduced the procedure to a simple claim under the United States of citizens for indemnification.

Had the United States chosen to deal with Great Britain upon the sole ground that an injury had been inflicted upon her national dignity and honor either by war or other appropriate means, doubtless the claims of her citizens would have disappeared as claims against Great Britain, but such was not her desire or the actual result of her conduct.

The election by the United States to press the claims for individual indemnification implies that such claims were entitled to legal recognition as such. Is there, then, anything in the principles of the law as applied generally, or under the condition of international relationship, or in the habitual practice of nations in their intercourse to exclude the idea that claims may exist, in a condition to have legal recognition, in behalf of the citizens of one country against the sovereign of another? Admitting that such claims may be merged, in a general state of hostilities, in the general cause of war is not inconsistent, but on the contrary agreeable to the idea of their existence in a specific form prior to such merger. It is undoubtedly true that the obligations due to a State are in a general sense due to the citizens of that State, each and all, as well as to the government of such State. It is true nevertheless that contract obligations between States, in their govermental capacity, are not to be regarded as obligations in which the individual citizens of such State participate as parties, but there are other obligations affecting States that depend upon different principles. The obligation to respect the rights of property of others, that certainly affects communities as well as individuals, arises from principles essential to the existence of civil society, while contract obligations depend upon the assent of the obliged party. Social necessity certainly implies that whoever is capable of invading the proprietary rights of an individual must be bound to respect those rights, and that capacity is possessed as well by governing States as by individuals. It appears, then, that sovereign States are within the reason of the rules that support the obligations upon which the protection of property rights depends.

The fact that the rights of a citizen that have been invaded by the sovereign of another state can only be vindicated through the aid of the sovereign of such citizen is not decisive against the title of such rights to legal recognition. The question here is of the mode of vindication solely. A right without the means of vindication is imperfect as incapable of being placed in a position to receive legal recognition, but the moment the means of vindication are supplied, although the right in its nature and incidents has undergone no change, it becomes the basis of a legal judgment. Many persons having clearly defined legal rights are compelled to prosecute or defend them in the name of a guardian or next friend, but that circumstance does not change the legal quality of their rights, and affects merely the mode of vindication. Citizens of a State incapable of proceeding directly against another State are in the category with the persons just referred to, and the same principles should apply to the investigation of their rights. Although a sovereign may exercise an independent discretion whether he will assume the vindication of the rights of his subject against a foreign state, yet when that office is assumed there is nothing to prevent the legal recognition of such rights as perfect in character. Inasmuch as the United States did assume to demand reparation of the individual wrongs committed, it is clear that there is nothing in the rules and principles of the law to prevent their recognition as based on legal rights.

It remains to inquire whether there is anything in the habit of intercourse and dealing between States that interferes with the recognition of claims by a citizen of one State against the sovereign of another for invasion of the right of property by such sovereign. On the contrary, such demands are habitually made and recognized, and indemnifications made on account of them.

It may then be affirmed that the United States, by assuming to enforce the demands of the appellant, have placed his claims in such a position that they are entitled to be recognized as legal and valuable claims, and as such capable of producing the legal consequences that will hereafter be stated.

SECOND PROPOSITION.

The Government of the United States, having knowledge of said claims, and of their validity, were bound, in behalf of the claimants, citizens of the United States, to present them to the Government of Great Britain and demand the satisfaction thereof, in virtue of the recognized duties of government to protect its citizens against unlawful violence on the part of the governments and peoples of other countries, subject only to the condition that the Government of the United States should determine that the prosecution of such claims was consistent with the public interests of the United States. That, subject to such conditions only, the duty of the United States was absolute to demand and claim satisfaction of said claims, notwithstanding the claimants had no means by which they could compel on the part of the United States the performance of such duties.

This proposition is an attempt to state the relations between the governing authority of a community and its citizens in terms that imply the legal nature of such relationship. The law deals, wholly, with obligations and their consequences, and recognizes relationships only by the obligations that sustain them. If, then, the relations between the sovereign and subject form any part of our legal system it is because that system contemplates the existence of obligations as mutually affecting both sovereign and subject. The proposition would not be accepted, at this day, that the only bond that unites the sovereign to subject is one of an ethical or moral character, or a consequence of the presence of irresistible force, but the habit of thought prevailing at this day demands that such relation be conceived as a civil relation, definable by obligations recognizable as part of our legal system. This relation must be stated from the principles of the law as applied to the nature and purposes of governmental protection. Stated in this way, it is obvious, that it may be affirmed as the legal duty of the sovereign to intervene for the protection and redress of the rights of the citizen as against foreign states as well as internal aggressors. If the administration of internal justice is regarded as a debt due to the citizen from the sovereign authority, as our law always has considered it, the parallel duties as it regards protection from aggessions from without must have the same character, for it depends upon the same grounds and reasons.

But the duty of vindicating the rights of the citizen as against foreign aggression is subject to an unlimited descretion on the part of the Government, as it regards the effect of such an act of vindication upon the public interests. This discretion covers not only the time and mode of vindication, but the question whether it can be undertaken at all consistently with the public interests. But this amplitude of discretion does not displace the idea of obligation on the part of the sovereign, for there are ways in which definite legal consequences can arise out of such obligation, especially where, as in the present case, the sovereign has assented to be bound by the same rules that effect private individuals in like cases. The next proposition will attempt to show how this general obligation can, through the act of the sovereign, became the source from which specific duties may arise as affecting such sovereign.

THIRD PROPOSITION.

The United States decided that it was consistent with the public interest to prosecute such claims, and did, in behalf of the claimants, present said claims to Great Britain and did demand payment thereof, and did enter into negotiations with the Government of Great Britain for the payment thereof. That in virtue of such decision and the assumption of the duty of presenting and prosecuting such claims the United States, acting by its executive, became the agent and representative of these claimants in the premises, and bound to use due care and diligence in the prosecution of said claims, to adjust and collect the same with due regard to the rights of the claimants in the premises, and to pay over to the claimants, without unreasonable delay, such sums as they should receive on account of such claims.

This proposition assumes to state the legal relations existing between the United States and the appellant arising out of the fact that the former assumed the presentation and prosecution of the claims of the latter against Great Britain. If that duty had been assumed by a private individual the consequences stated in the third proposition would not be disputed, and the only question is, whether the same consequences are capable of being attributed to the relations between a sovereign and his subject.

If the decision of the Court of Claims, in this case, is rightly understood it affirms that a sovereign cannot be legally affected by the responsibilities implied by the proposition just stated without the aid of positive law. If it is intended by this conclusion to hold that a sovereign cannot be bound in the manner indicated so as to give rise to an enforceable implied contract without the aid of positive law, we cannot object to the general position thus assumed. The proposition under consideration does imply that the obligations of the United States, as stated, were such as to enable an implied agreement of an enforceable nature to arise out of them, but we do not claim that this could take place independently of the provisions of positive law. We affirm that the law conferring jurisdiction upon the Court of Claims is such a law, and have already presented reasons why it should be regarded as authority for the implication of contracts against the Government where such a liability would be the consequence of the principles of the law as operating upon like transactions by private persons. It is submitted that the error of the Court of Claims consisted in the assumption that unless the United States assumed towards the appellant the relation of a technical agent in the prosecution of his claims such consequences could not follow. That court virtually held that the character of a sovereign precluded the possibility that he should assume the position of a technical agent, bound to follow the instructions of his principal, towards his subject in the matter of vindicating the demands of that subject against a foreign sovereignty.

We cannot object to this conclusion, for it would, indeed, seem inconsistent with the functions of a sovereign that he should conduct a controversy with a sovereign power under instructions from an interested subject. But what we do object to is the relevancy of the reasoning of that court to the case in hand.

It is not necessary to affirm that the United States assumed the attitude of an agent bound to follow the instructions of a principal in the presentation and prosecution of the claims in question. A guardian or a trustee clothed with discretion prosecuting a demand in that character is not bound by the instructions of the person for whose benefit he acts, and yet is under the responsibility to use care and dilligence in the performance of such duty, and to account for the product of such prosecution. There is nothing in the nature of governmental guardianship that would be inconsistent with the assent of a sovereign to be bound by like obligations as bind private citizens where acting in the interest and behalf of individuals, and for a sovereign to assent to be made liable upon implied contracts generally, is to declare that he will be bound by the ordinary obligations affecting citizens in all dealings involving contract relationships.

The assent of a sovereign to be bound by the responsibilities that, as we contend, bound the United States in dealing with the claim of the appellant, is merely applying to himself rules and principles by which he holds his officers and public agents bound in like cases. Public officers, bound to perform acts for the benefit of private individuals, in a manner prescribed by law, are, habitually, held legally responsible to the parties for whom such acts were by law intended, in the event of their neglect or improper performance of such duties. According to former usages such officers were compensated for the discharge of such duties by fees, fixed by custom or positive law, to be paid by the parties entitled to claim the performance of such acts, and were distinguished as ministerial officers from those that owed their whole official duty to the public interest. In such cases the public officer was not an agent of the person for whose benefit he was required to act, in the technical sense of being bound to act according to the instructions of such person, and yet the obligation to that person for the exercise of due care and dilligence was distinctly present. While such services by public officers were compensated by fees from the persons entitled to demand their performance, the relations between them and those in whose interest they exercised their public powers appeared to be contract relationships, there being mutual obligations and mutuality of benefits, but the ground of their liability did not consist in the semblance of contract relationship, for at this day, when such officers are generally compensated from the public treasury, and have no right to demand fees for such services, they are held to the same responsibilities.

It may be affirmed that where a public officer is bound by law to exercise his public powers for the benefit of an individual, and in a manner prescribed by law, he is responsible to the person for whose benefit such duties were intended. The assent of a sovereign to be held to the same responsibilities, where acting in the interest and behalf of an individual, is merely subjecting himself to the same liabilities that he imposes upon his public agents under like circumstances. Were it a question whether it is wise for a sovereign to concede such responsibilities, such question would appertain exclusively to the law-making discretion; but this question has been answered in the affirmative by the common interpretation of the principles of justice that characterizes the best civilization of this century.

We submit that the act conferring jurisdiction on the Court of Claims, in the case of implied contracts, is remedial in the fullest sense, and therefore should be liberally construed; that the object of the act was to place the rights of the individual on the same footing of security where dealing with the Government as he enjoys, by law, when dealing with an individual, in all cases where the Government assumes to act as the representative of his interests or deals with him expressly or by implication as a contracting party, provided that such implied contract is consistent with the laws, and does not arise out of or depend upon any treaty with foreign nations or the Indian tribes; that it is an embodiment of the enlightened sentiment that holds that governments should subject themselves to the same law that they enforce as between the subjects of their authority, and that such responsibilities, judicially discerned, afford to the administration of government the surest means of purifying its principles and methods. If we are correct in the position presented, then, unless something is found in the Constitution, the statutes, or treaties of the United States to prevent the same, the rules and principles of law as applicable to private persons should be applied to the consequences of the relations stated in the proposition under consideration, with the result that if the United States have failed to fulfill the duties thus indicated, under circumstances that would in ordinary cases warrant the implication of an implied contract, such implication should be applied to the present case.

FOURTH PROPOSITION.

The Government of Great Britain agreed to pay and did pay to the Government of the United States the sum of $15,500,000, in consideration that the United States would receive said sum of money in liquidation and satisfaction of the claims of the claimants, and of other citizens of the United States holding similar claims, and the Government of the United States received said sum and cancelled and discharged the claims of the claimants, as against Great Britain, whereby said claims, as against Great Britain, became extinguished and destroyed.

The effect of the award and payment was determined by the Treaty of Washington in the following clause: "The high contracting powers engage to consider the result of the proceedings of the Tribunal of Arbitration, and of the Board of Assessors, should such board be appointed, as a full, perfect, and final settlement of all the claims heretofore referred to, and further engage that every such claim, whether the same may or may not have been presented to the notice of, preferred, or laid before the tribunal or board, shall from and after the conclusion of the proceedings of the board, be considered and treated as finally settled, barred, and henceforth inadmissible." (Art. XI.)

It is evident that all claims for damages, public or private, arising from the breach of neutrality on the part of Great Britain, to which the treaty relates, were finally barred. under the operation of this clause. So far as such claims were presented to and adjudicated by the tribunal, the inherent force of the judgment of that body extinguished them, as against Great Britain, while, as it regarded claims not presented, whether through the neglect of the parties in immediate interest to bring them to the attention of the government, or through intention or neglect on the part of the government, the operation of this clause of the treaty was to finally bar and extinguish them as claims against Great Britain.

It follows, then, that the claims in suit became barred and extinguished under the operation of the treaty by the act and consent of the United States.

FIFTH PROPOSITION.

That by the extinguishment and destruction of said claims as against Great Britain the property of the claimants became lost and destroyed by the act of the Government of the United States, and the Government of the United States became bound to make compensation to the claimants in one or the other following modes: If such extinguishment by the United States was induced by the public benefit to be derived, then the act in question was the taking of the private property of the claimants for the public use, and the United States were liable to the claimants for the full amount of the indebtedness of Great Britain to them; if the money received by the United States was so received for the use and benefit of the claimants against Great Britain, then the United States became bound to pay to these claimants the amount of their claims or a just proportion of the amount received having relation to the amount of claims settled in the aggregate.

This proposition presents the relations of the United States to the claimant under alternative aspects. The first aspect assumes :

1st. That the United States acted in the extinguishment of the claims against Gritain Britain solely in the public interest, without any element of ministerial duty, as it regards the claimants ; and 2d, that it acted wholly in the interest of the claimants, and not of the public at large, as it regards the claims for private damage. The consequences of these assumptions should be separately examined in order to discover the legal consequences of the action of the government.

FIRST CASE ASSUMED.

In this case the transaction was the taking of private property for public use, rendering the United States liable to make full compensation to the extent of the amount due from Great Britain to the claimant, as ascertained by the award. The Constitution of the United States (Art. V. of amendm'ts) limits the authority of both Congress and the Executive to take private property for public use by the conditions that adequate compensation must be made therefor. The effect of this clause is to create the relation of vendor and vendee between the United States and a citizen whose property it is seeking for public uses. This relation differs from the ordinary relation between vendor and vendee in certain particulars; the United States can compel the sale and fix the proper compensation therefor by an act of the law-making authority; but in other respects the legal consequences of the relation are the same as in the ordinary relations between vendor and vendee. If the law-making authority does not ascertain the proper compensation to be paid, the clause of the constitution stands as a contract to pay what the property is reasonably worth, and such contract may be enforced under the jurisdiction conferred upon the Court of Claims.

This court in U. S. *vs.* Russell (13 Wal., 423,) appears to have sanctioned the idea that compensation is a condition precedent annexed to the right of the government to deprive the owner of his right without his consent. It is evident that it was not here intended to be said that the power of the Government to take was dependent upon the previous ascertainment of the proper compensation, so that until that condition precedent was fulfilled the attempt of the Government to take was nugatory, for that would deprive the Government of a necessary power, especially demanded in cases of public urgency. It must then be assumed as the intended meaning, that the Constitution brought the United States, and one from whom it sought to take property for public use, into contract relations, and an agreement to pay a reasonable price was the condition of such contract. This is equivalent to saying that the provision in ~~to~~ question has the force and effect of a contract to pay what is reasonably due for property taken from the citizen for public use. If this construction is admissible a claim for property taken by the United States is one within the jurisdiction of the Court of Claims, where the property is that of a citizen, and the use for which it is taken is public.

The question then arises, under the assumption undergoing examination, whether the chose-in-action of the claimant against Great Britain was property, in the sense of the Constitution, and whether the extinguishment of such a claim for benefits to qe derived by the United States alone, was a taking for the public use.

If it appears that a chose-in-action is equally within the language and the object of the clause of the Constitution it must be concluded that the taking of a chose-in-action of a citizen for the public use is an act subjecting the United States to a contract obligation to pay its value to the deprived owner. The protection of the Constitution is, in terms, extended to all private property, and that, in the full sense, includes choses-in-action. As no kind nor description of property is named all must be understood to which that term is applicable unless the object of the protection does not extend to some particular class, in which case that particular class may be excluded. The object of the clause in question is as comprehensive as the term used to describe that to which such protection shall extend. That object was to equalize all contributions of the citizen to the common good, by affording protection, as against the Government, to his property in excess of that demanded on the basis of equal taxation. That such protection was equally demandable, as it regarded all possessions to which value was attributable, is obvious. The conclusion just expressed met the approbation of the Court of Claims in Grant *vs.* U. S., (1 Ct. Clms. 41,) and in Meade *vs.* U. S., (2 Ct. of Cl. 224.).

On the assumption that the United States has by a voluntary act extinguished our claim against Great Britain for advantages to enure to the public alone, the question is presented whether such an act is a taking for public use, in the sense of the Constitution. It is important to observe that the benefit obtained by the United States for the extinguishment of the claims was of a pecuniary nature, consisting of a large sum of money, which, according to the conclusions of the Court of Claims in this case, enured exclusively to the advantage of the public treasury. If that is the view to be taken of the case, then the United States have made a large pecuniary gain by appropriating what must either be regarded as the product or pecuniary equivalent of the claim of the appellant, and presents in the most distinct form a taking for public use. If it be said that such a transaction does not represent what is ordinarily meant by a taking of private property for public use, it may be admitted that in one sense the criticism is correct. It is ordinarily assumed that where a government proceeds to take the property of a citizen for the public use it will proceed in that due and orderly manner sanctioned by general practice and enlightened opinion, and it may even be admitted that the framers of the Constitution had in actual anticipation only such a course of procedure, but their language expresses no such limitation of the scope of their enactment. To assume that a fundamental measure of protection to the proprietary right of the citizen was only intended to limit the orderly procedure of government, and left unprotected the right of the citizen as against the irregular exercise of public power, is to deprive such a measure of protection of its most important element of value. The case supposed contains that which is in substance and effect a taking of private property for public use, however irregular in form, and therefore is, according to recognized rules, within a clause intended for the protection of the citizen against the government.

If it be said that it was not the intention of the government to ultimately enrich the public treasury by retaining the fund in question, but to disburse it to claimants, this would not alter the case if such claimants were to be arbitrarily selected by the government to the exclusion of those whose property it formerly was, inasmuch as to take private property to dispose of in public gratuities is essentially the same as taking for the economic advantage of the government.

It is not necessary to consider what might have been the effect had the claims in question become lost among the incidents of a state of war, or been sacrificed by the Government under a general necessity for the maintenance of peace, for, in the present case, their value is in a pecuniary form in the Treasury of the United States, as the product of a reclamation against Great Britain upon grounds that included the very claims in suit. Nor is it necessary to consider what might be the effect of a claim on the part of the United States that the money received from Great Britain represented public property alone. Admitting that Congress might, notwithstanding the open record of the proceedings by means of which it came into the possession of the United States, have declared, with the force of law, that the proprietorship of the fund derived under the Treaty of Washington appertained solely to the United States, yet it has not done so. If the Government asserts a proprietary claim to property in the hands of a private citizen, its proceedings to obtain possession of such property cannot be regarded as an instance of the taking of private property for public use. It may be that such claim on the part of Government is without any foundation in justice; but if its validity is asserted by the law-making authority the judicial authority is inadequate to declare the contrary. In the present case neither the executive nor the legislative authority has asserted at any time that the fund in question is the property of the United States, although difference has arisen as to the proper mode of its distribution. On the contrary, it is an admitted fact that the United States holds the proceeds of private claims against Great Britain collected under the Treaty of Washington, and has recognized a general duty of distributing that fund among the citizens entitled to it.

As then the case of a taking of private property for public use, just considered, is a purely suppositious case, the object of its discussion ought to be made apparent. In the first place, it is the aspect of the case presented by the judgment of the Court of Claims. The case as there presented is that of a sovereign making use of the demands of a citizen against a foreign power to acquire public property, and that is distinctly a taking of private property for public purposes. That court having before it its own conclusions in Grant *vs.* U. S. and Mead *vs.* U. S., should have declared that under that view the claimants, whose claims were thus appropriated to the use of the United States, should have a remedy in that court. But our view is that the position held by that court cannot be reached without contradicting public history and the force and effect of the Treaty of Washington, and of certain legislation passed under it that will presently be noticed. We submit that that court should have based its judgment upon a presumption that the United States intended to receive and hold the money derived under the Geneva award for the use of the parties whose claims were submitted to and approved by such award.

The existence of such a presumption is the occasion for discussing the constitutional liability of the United States in the case of a taking of private property for public use without the ascertainment of a just compensation therefor.

We submit that under the clause of the Constitution that has just been considered it was the clear constitutional duty of the government having come into possession of a fund that represented private property to hold that fund for the use of those whose property it represented, and that such duty gives rise to a presumption that the fund was so held. If it was part of the constitutional powers of the government to hold at will the property of private persons for the public use, no such presumption could be claimed for, in that case there would be no legal duty upon which to base it. But that power has been denied to the Government of the United States by the ultimate sovereign authority, except on the principle of compensation, and therefore a duty arises of the nature to support the presumption contended for. The judgment of the Court of Claims rests upon the opposite presumption that a sovereign habitually prefers his own interest to that of the citizen, without regard to the consequences of the principles of the law, and that notwithstanding our Constitution such a claim is recognizable by the courts as a right.

If this court concludes that the money that came into the hands of the United States under the Geneva award represented the proceeds of the claims of the appellant against Great Britain, we submit that it must be concluded that the United States were under a clear duty arising from the clause of the constitution in question, through the proper implications therefrom, to pay that money to the appellant, and being under such duty it is presumed to have held such money to the use of the appellant. The proposition just advanced embodies the second of the alternative cases presented by the fifth proposition.

It is not necessary to rest the proposition that the United States held the proceeds of the Geneva award solely to the use of the appellant, and the class of persons standing in the same relation with it, upon the implications from the clause of the Constitution relating to the taking of property for public use, as independently of that clause an implied contract could be raised.

We submit that the principles of the law, recognized as applicable to the relations of the government to private citizens, in the cases submitted to the jurisdiction of the Court of Claims, lead to the conclusion that what was done in the prosecution of the claims by the United States was done in the assumption of a duty to the claimants of the same nature as that imposed by law upon officers whose duties are of a ministerial character, as intended for the benefit of private individuals, and that as a necessary consequence the fund derived from that source was held to the use of such persons. As between private individuals, such a transaction would give rise to an implied contract, on which an action for money had and received to the use of the persons concerned might have been brought, in the event of the appropriation or misapplication of the fund by the recipient. Upon the principles already stated, such an implication must arise against the United States, unless it appears to be excluded by some declaration of the law-making power.

That the Court of Claims should have held, in accordance with the propositions just stated, would appear to be a necessity under the principles that appear to have guided its judgment in Tyers *vs.* United States. (5 Ct. of Cl., 509.)

In that case the court while admitting that its jurisdiction in this particular case had been ousted, asserted its general authority to allow claims against the United States as for money had and received, where the United States had received money from a foreign power properly payable to a citizen.

If, then, it is concluded by this court that a sum of money was included in that received by the United States under the Geneva award as the product of the claims of the appellant against Great Britain, we submit that the conclusion is irresistible, that such sum was received and held for the use of the appellant, and can sustain an implied contract cognizable in the Court of Claims.

The situation of the fund was such as to offer no impediment to the operation of the principles leading to the conclusions just stated. The whole sum awarded and paid was received to the use of a recognizable class of persons. Had the United States an undefined interest in the fund that could only be defined by the law-making authority, it might be said that the situation of this fund precluded the use of a judicial remedy; but such was not the case, as no part of the award represented claims of the United States for public injuries sustained. The persons constituting the class entitled to the whole award are capable of being known by judicial means, being defined by law. In ascertaining the persons composing that class it must in the first place be limited to the persons whose claims were actually submitted to the Geneva tribunal. The American case shows specifically who were the persons thus included, and the amounts claimed by them respectively. From the class of persons thus ascertained must be excluded those whose claims were inadmissable under the decisions and rulings of the tribunal.

Whether the proportional shares of the several persons constituting the class to whose use the fund was received are capable of being ascertained from the record of the case without the aid of extrinsic evidence, or whether that ascertainment must depend upon evidence beyond that record, their ascertainment is an ordinary judicial act. The division of the aggregate sum, if in the nature of a partition among the persons entitled, according to their respective legal and equitable rights, is within judicial cognizance. As the United States is entitled to no part of the sum, it is not necessary to enquire whether communities of right between the United States and an individual can be dissolved by judicial means, and if such means are appropriate, whether they lie within the jurisdiction of the Court of Claims. As the United States holds an aggregate sum to the use, in severalty, of a class of persons definable by law, each member of that class has his remedy for his several interest. It is true that for the purposes of such a partition division must be made among the persons severally entitled; but the United States has no other interest in that division, except that it shall be final as among the parties. If the Court of Claims should find it necessary to have before it the several parties entitled to participate in the fund, we submit that it is the duty of that court to call in all the requisite parties. As the appellant does not ask the division of the sum on equitable principles, but merely that which may be had in a court of law, it was not necessary that the other persons having like interest should be made parties. If such an addition of parties is demandable, it is only made such by the interests of the Government, and it is for the Attorney General to take such steps as he may deem essential to the protection of the Government.

We submit that the various parties in interest in the fund have not a common interest therein, but each has a several interest that is recoverable by an ordinary action at law. If the whole amount received by the United States had been received on account of the appellent alone, the duty of the Government would have been to pay it over without unreasonable delay. In that case Congress would have authority to determine the time and mode of payment, but in the event that no such power was exercised by Congress the court could determine whether delay in payment was reasonable or unreasonable, and in the event that it was ascertained, either:

1st. That the United States had appropriated the money to it own uses.

2d. That it had misapplied it, or,

3d. Had unjustifiably neglected to make payment, a petition would lie in the Court of Claims for its recovery as for a wrongful act in violation of the implied contract of the Government with the claimants.

But an aggregate sum was paid, due to a class of persons in which the appellant was included, rendering it proper that the individuals constituting such class should be ascertained and their respective demands upon it fixed. As a consequence of this fact the United States had a certain administrative duty to perform relatively to the distribution of the fund having a bearing upon the reasonableness or unreasonableness of its delay, that must be considered in order to ascertain when an actionable wrong was chargeable against the Government by the claimants. These questions will be considered under the VIIth proposition.

SIXTH PROPOSITION.

The Government of the United States has by various acts of Congress recognized that the money received by it from Great Britain, as aforesaid, was due to the claimants whose claims were extinguished in the manner stated.

In accordance with what has been already advanced, an implied contract arose upon the receipt of the award by the United States to pay to the class of persons entitled the sum so received, and as the persons composing that class had each a several interest in said sum, the implied contract had a several character, and hence the appellant, being one of that class, is enabled to allege such a contract with itself. If that contract, at its inception, was in harmony with the Constitution, laws, and treaties constituting the supreme law of the land, then it was capable of being enforced in the Court of Claims. It was not necessary that the implied contract should have the distinct sanction of the positive law, for unless in conflict with such positive law, it would take effect as a perfect and enforceable contract under the act creating the jurisdiction of the Court of Claims. We are enabled, however, to affirm, in the terms of the sixth proposition, the actual recognition of the relations between the United States and the various claimants, in virtue of which the implied contract arose.

We have already considered the force and effect of the clause of the Constitution relating to the taking of private property for public uses as imposing a duty upon the Government to respect the proprietary rights of the citizen where the property that is the subject of such rights is found in the possession of the Government. It is manifest that the circumstance that property in which a citizen has a distinct interest, coming into the possession of the Government, the clause of the Constitution in question operated to secure such right to the citizen, as, for instance, where the United States acquires the legal title to lands charged with a trust, the clause would operate to insure such private proprietary right, and to raise an obligation on the part of the Government to conserve or compensate such right. So, if the Government receives money under circumstances where, in the case of private individuals, such possession would be linked with the duties incident to an agency, we submit that the clause under consideration would extend its protection to the person entitled to demand the performance of such duty of agency.

These conclusions arise from the idea that the clause in question was intended to equalize the contributions of citizens to the support of the Government by imposing upon the Government the duty of respecting the property rights of private persons, subject only to the exercise of the taxing power in its various forms in a direct and equal manner. It may then be affirmed that so far as the Constitution is concerned, it is not only not inconsistent with the implied contract sought to be enforced, but that it actually lays in the positive law the foundation for such an implication.

As it regards the acts of Congress, it is affirmed that the state of liability already disclosed, as affecting the United States, is admitted by acts of Congress.

It was impliedly admitted by constituting the proceeds of the award as a specific fund under the act of March 3, 1873. (17 Stat., 601.) This act provided for the "investment" of the fund in question in 5 per cent. registered bonds of the United States; "to hold subject to the future disposition of

Congress." This act, *first*, created a specific fund; *second*, assumed an administrative control over it, for the time being excluding all other recourse to it; and, *third*, by the recital of the source from which the fund had been derived, virtually implied that it was intended as the proper means of carrying out the purposes with which its creation was connected.

If a private agent, having in hand the money of his principal, had in like manner set apart a definite fund, appropriated in accordance with such duty of agency, such fund would have been brought within the cognizance of a court of equity as a trust fund, and hence the act in question must be regarded as a declaration of trust in favor of such persons as by law were entitled to participate in the benefits of the fund.

The act of June 23d, 1874, (18 Stat., 245,) expressly recognizes the existence of individual rights to said fund.

That act assumed to supply judicial means for ascertaining certain classes of persons entitled to participate in the fund in question, although the commission created by it was limited to a partial ascertainment of the persons entitled to participate in the fund, yet it clearly implies a duty on the part of the United States to distribute the fund among those entitled by law to it. The effect of such limitation will be hereafter considered; that to which attention is now invited, being the entire consistency between the existence of an implied contract binding the United States to distribute the fund and the creation of judicial means for such distribution.

The act of March 3, 1873, was the only act of Congress that effected the rights of the parties as it regards the question of the implication of a contract at the time the proceeds of the award were paid into the hands of the United States, and set apart for the use of the proper claimants, and as has been seen, was entirely consistent with such an implied contract.

Unless, then, there was something in the Treaty of Washington that interfered with the origination of such an implied contract, it can be affirmed that its implication was in entire harmony with the Constitution, statutes and treaties. That treaty was intended as a means by which not only the United States, but the private persons who suffered by the hostile acts of Great Britain might receive indemnification for their losses. Its scope and object was to supply the means of adjudicating such demands against Great Britain, and of applying the proceeds of such adjudication to their proper uses. It contains no declaration of the means by which the award, when received by the United States, should be disposed of. It called for no commission or tribunal as the exclusive means of ascertaining the individuals entitled to its benefit, and therefore did not displace any judicial means appropriate to that purpose. If it had designated a particular means by which the fund should be distributed, doubtless such a declaration would have excluded the jurisdiction of the Court of Claims; but no such provision was made. The treaty did not declare that the fund should be distributed at the discretion of the Government, and therefore contained nothing that having the force of law could prevent the origination of an enforcible implied contract. It follows that there is nothing in the treaty considered as the law of the land to prevent the implication of the contract contended for.

SEVENTH PROPOSITION.

The right of the claimants to demand payment out of the sum so received by the United States was subject to the authority of Congress to hold the amount received as a separate fund, set apart from all other funds, and to subject the same to a course of administration for the purpose of applying the same to the claimants entitled thereto, and the claimants, while having a general right to demand that their claims should be respected, had no right of action against the United States as it regarded the disposition of such fund, nor as a general debtor, nor could such rights arise until, by some act on the part of the Government, its obligation to the claimants was violated and an actionable wrong consummated.

This proposition contains the idea that the United States had the right, consistently with their obligations to the claimants, while holding the fund as a separate fund, not appropriated to its general uses, to determine and institute the means by which the claimants to the fund should be ascertained. While the fund specifically existed, and the course of administration upon it was in progress, the claimants were excluded from all other remedies to secure their interests in the fund. This exclusion was consistent with the obligations of the government to the claimants, so long as the means adopted by the government were such as to be in accordance with the duty of distribution among all claimants entitled. Our position is that the act creating the specific fund was entirely consistent with the relations existing between the government and the claimants, but, independent of the fact of consistency with such obligations, the sovereign law-making authority had clear power to exclude the claimants from a remedy against the fund, or against the United States, upon any general liability, and actually did so exclude them by the act in question during the existence of the specific fund.

The consequence of the positions just assumed is that until one of two events should happen no cause of action cognizable in the Court of Claims could come into existence, namely, until first, the United States should appropriate the fund to its general uses, or second, should divert it from its proper uses. Until one of such contingencies should arise, the possession and control of the fund by the United States was consistent with the rights of the claimants, and accordingly no actionable wrong could be imputed.

EIGHTH PROPOSITION.

By act of Congress the fund was set apart and a course of administration adopted, by which a certain class of claimants were provided with a special means of presenting their claims, namely, by means of a commission for the adjudication of such claims, and from which another class, including these claimants, was excluded; thus giving preference to certain classes and postponing others until such course of administration was concluded or changed. That such classification was arbitrary and had no relation to the legal rights of the respective parties, excluding according to occupation and success in their business, all insurers who had been fortunate in insuring war risks during the war, in the course of which the captures in question were made, and its effect was to postpone the claims of the claimants who were in the class denied the specific remedy in question.

This proposition assumed to state the general character and effect of the legislation of Congress on the subject of the Geneva award, and it proceeds from the earliest legislation on the subject to a period of time subsequent to the origin of the cause of action in this case on the 31st of March, 1877, and accordingly embraces all the legislative action that could affect that cause of action if out of harmony with it. Two acts of Congress are to be particularly considered in this connection, namely, the act of March 3d, 1873, creating the specific fund already noticed, and the act of June 23d, 1874, establishing the first commission for the distribution of the proceeds of the award.

According to the effect of these acts, as stated in the eighth proposition, there are three subordinate propositions advanced:

1st. That Congress set apart the fund in question as a specific and tangible fund, separate from the general funds of the United States.

2d. That it appointed a means of administering the fund, namely, by the creation of a commission for the adjudication of a certain limited class under the general class entitled who were preferred in the distribution of the fund.

3d. That by the effect of these enactments the right of the present claimants, they not being in the class preferred, were postponed until the purposes of such administration were accomplished.

We submit that, by a proper construction of the acts of Congress affecting the case, and according to the proper effect thereof, the right of the claimants to any means of prosecuting their claims was postponed until the 31st of March, 1877, when the fund was destroyed in its specific character and the specific remedy was at an end.

Before proceeding to examine the statutes already mentioned as bearing on the present aspect of the question, we desire to submit what we conceive to be the rules applicable to their construction. We contend that an act of Congress should receive, if possible, that construction that conserves the legal rights and remedies of the individual as against the government, and for that purpose its language should be confined to the purposes expressly declared, or by necessary implication involved in its express declarations and to the allowance of such means as are appropriate to such limited purpose.

The general proposition as to harmonizing acts of Congress with the State of vested rights cannot be stated more fully or exactly than was done by Justice Clifford in the twenty per cent. case, (20 Wall., 117,) where it is said: "Courts of justice agree that no statute, however positive, is to be construed as designed to interfere with existing contract rights of action, or with vested rights, unless the intention that it shall so operate is expressly declared, or is necessarily implied." As this consequence arises from the principles of the law it is obvious that it affects the construction of law affecting contracts to which the government is a party and causes of action arising out of such contracts.

We submit that an act of Congress creating preferences among claimants equally entitled to the fund was inconsistent with the obligations of the government, and such act and its preferences should be limited to what is necessary for the immediate and declared object of the act.

CONSTRUCTION OF ACT OF MARCH 3D, 1873.

The act of March 3d, 1873, was passed in anticipation of the payment of the Geneva award. It provides for the creation of a fund consisting of 5 per cent. registered bonds of the United States to be held, *subject to the future disposition of Congress.* Its effect was to create a specific fund, separate from the general funds of the Government, but it does not disclose the uses of the fund, except by the title of the act which is, "An act for the adjudication and disposition of certain moneys received into the Treasury under an award made by the tribunal of arbitration constituted by virtue of the first section of the Treaty of Washington, the 8th day of May, 1871, between the United States of America and the Queen of Great Britain."

This title implies that the act was intended as auxiliary to some intended measure of disposing of those moneys by means of a process of "adjudication." Adjudication implies that the ultimate benefit of the money was due to claimants other than the United States. This act created a specific fund that was to be distributed by judicial means in the manner that should afterwards be determined by Congress. It displaced all other means by which the parties entitled might reach the fund than such as should thereafter be provided by Congress, so long as the fund should retain the character conferred upon it by this act. As has already been said, the provisions of this act are in harmony with the obligations of the United States to the claimants, as it was consistent with impartial means of distribution. Prior to this act the United States had done no act that under like circumstances would have made a private agent liable to an action. By this act it acted in a manner consistent with its duties, and hence the act could not originate a cause of action; while the fund was held under administration agreeably to the purposes of this act no right of action could possibly arise cognizable in the Court of Claims.

CONSTRUCTION OF ACT OF JUNE 23D, 1874.

The act of June 23d, 1874, (18 Stat., p. 245,) repeats the title of the act of March 3d, 1873. It creates a "Court of Commissioners of Alabama Claims," establishes its jurisdiction and powers, regulates its procedure, provides for the payment of its judgments and expenses out of the specific fund, and, finally, provides for the destruction of the fund by the cancellation of the funded bonds when the court should have concluded its work and its judgments and expenses should be paid.

Sections 11 and 12 define the jurisdiction of the court, which was "to receive and examine all claims" "admissible under this act" * * "directly resulting from damages caused by the so-called insurgent cruisers Alabama, Florida and their tenders, and of the Shenandoah after leaving Melbourne." It was required to decide upon the amount and validity of such claims, such decision to be made "according to the principles of law and the merits of the several cases." It prescribed a period of limitation for the presentation of claims, namely, 6 months from the organization of the court, and declares all claims not presented in due time "finally and conclusively waived and barred."

The sections of the act referred to expressly or by implication involve certain propositions, namely:

1st. That there existed a class of private claimants who were presumably entitled to receive from the United States the specific fund.

2d. As an inference from this, that the United States were under a legal obligation to pay the amount, or so much as might be necessary, to certain private individuals establishing certain facts in regard to their relations to the damages represented by the fund.

3d. That such persons were to be ascertained according "to the principles of the law and the legal merits of the several cases."

4th. That, taking these sections in connection with the act of March 3, 1873, the specific fund was set apart in consequence of the recognition of a class of private claimants entitled to such fund, or some part of it, to be ascertained by judicial proceedings.

5th. That there were claimants to the fund to which it was not intended to extend the remedy afforded by it that were termed "inadmissible."

If the appellant can establish the facts alledged in its petition, the validity of its claim to be paid out of the moneys derived from the Geneva award is a proper inference from the concessions made by this act. Conceding that the claimants of the class to which the appellant belongs were excluded from the remedy supplied by the act as not "admissible," in the sense of its language, the question arises whether that exclusion was the result of a preference given to a certain class of claimants that did not include the class to which the appellant appertains, or of an adjudication or legislative declaration that the class of claimants not admitted to the remedy had no valid claims against the United States, as it regarded the fund in question.

We submit that by a proper construction of the act, its only effect was to prefer a certain class of claimants to the specific fund by giving them a specific remedy, which, in effect, gave them prior access to the fund, and to postpone all other claimants until such preferred class was provided for. This proposition implies that it was no part of the purpose of the act to adjudicate or declare invalid any claims that were excluded from the specific remedy.

We submit that such a legislative declaration would be destructive of the legal right of individuals under an implied contract with the government, and consequently such an intention cannot be implied on lower grounds than those of *necessary* implication. If it appears that the immediate and expressed purpose of the act could not be accomplished without an implication violative of private rights, then it is possible that such an implication may stand as a necessity of the direct expressions of the act, but not otherwise. The declared purposes of the act can have full force and effect without the aid of an implication that the destruction of the claims of the claimants not admitted to the special remedy was intended.

It is necessary to examine the construction of the act as bearing on the question whether it intended the destruction of the claims not preferred by it, or merely a preference of certain claimants and the postponement of others. The only expressions in the act that can, by possibility, cover the idea of an intention to declare the legal invalidity of any existing claim to the fund are the terms "admissible" in the 11th sec., and "admissible" and "admit" in the 12th sec.

The term "inadmissible," as used in the 11th sec., is there used for the sole purpose of defining the jurisdiction of the commission by bringing certain cases within that jurisdiction and excluding others therefrom. The first clause of the 12th sec. declares "that no claims shall be admissible or allowed by said court" for any loss that had been compensated to the claimants "from any insurance company, insurer or otherwise," but allows claims for any uncompensated balance. The effect of this clause was to exclude from the jurisdiction of the court all claims presented in the name of, or for the use of, an insurer. The language employed is that of direction to the court as to what they shall admit or allow, and cannot be construed as a legislative declaration of the invalidity of any claim against the fund.

It is not a *necessity* of the interpretation of the first clause of the 12th section to extend its meaning to include such a legislative aggression upon private legal right.

The second clause of section 12th declares "and in no case shall any claim be *admitted* or *allowed*" for or in respect to certain enumerated cases of speculative damages.

The third clause of section 12th provides as follows: "And no claim shall be admissible or allowed by the said court by or in behalf of any insurance company or insurer, either in his own right, or as assignee or otherwise, in the right of a person or party insured as aforesaid unless such claimant shall show to the satisfaction of said court, that during the late rebellion the sum of its, or his losses in respect of its, or his war risks exceeded the sum of its, or his premiums or other gains upon or in respect to such war risks, and in case of any such allowance the sum allowed shall not be greater than such excess of loss." We submit that this language is addressed to the court and is a limit of its powers, and not a legislative declaration of the invalidity of any claim.

The fourth clause of the 12th section allows no claim to be "admissible or allowed by said court" in favor of any insurance company unless such company exists under the laws of one of the United States.

By the fifth clause of section 12 no claim is to be "admissible or allowed by said court" unless made by a person entitled to the protection of the Government, and who bore true allegiance to the United States during the rebellion.

We submit that in all the clauses of the 12th section the terms implying exclusion of any claim are terms used solely to define the jurisdiction of the court and its powers. The collocation of the words "inadmissible" and "allowed" shows that the word "inadmissible" had reference, alone, to the definition of jurisdiction. Where the whole of a demand was *inadmissible*, it was excluded from jurisdiction; where, in a demand that was admissible, an incidental demand of an inadmissible character was presented it was not to be "allowed." The term *inadmissible* closes the doors of the court, while *allowed* limited its powers where its doors were open.

We submit that the implication of an intent to declare the claims of insurers invalid is inconsistent with the express provisions of section 12. The right of insurers to participate in the fund is *admitted* by the fact that certain classes of insurers are directly authorized to prosecute in the court. s/ Of the insurer‸having claims on the fund, such as were unfortunate in the business of insuring war-risks during the war, were expressly authorized to go before the court. The effect of this was to recognize, in principle, the validity of the claims of insurers as such; to confer a specific remedy upon a class of insurers who had been unfortunate in business, and to exclude from such remedy insurers who had been fortunate in their business. To hold that this was an attempt to declare the invalidity of the claims of fortunate insurers is to charge upon Congress an intention that cannot be imputed consistently with the respect due to that body.

If a legislative declaration of the invalidity of any claim of an insurer is implied, it must be regarded as grounded on the favor of Congress for the class of unfortunate insurers of war-risks during the rebellion, and its disfavor towards those who were fortunate in such business. Such a motive for granting or withholding an act of justice cannot be presumed; at most, it must be regarded as arising from the fact that Congress considered the case from the standpoint of the relative pressure of the pecuniary necessities of the claimants, and based a preference upon urgencies of that character. An implication of an intent to invalidate the legal claims of fortunate insurers is inconsistent with the fact that the discrimination between insurers was independent of the status of their legal right, and the circumstances of exposure and capture by the cruisers for which Great Britain was held accountable. The unfortunate insurers were such persons as were engaged in the business of taking war-risks during the rebellion, and in the summing-up at the close of the war of their profits and losses *in all their war-risks* were found to have been losers on the whole.

In such a computation of profits no distinction is made by the act as to the nature of the war risks, and losses are to be included whether from the vessels for which Great Britain was responsible or otherwise. While the unfortunate insurers could not recover beyond their legal claims, their actual recoveries were to be measured by their business losses as insurers of war risks. This provision implies that the business of insuring war risks was not only agreeable to public policy, but entitles those engaged in it to the peculiar sympathy of Congress, placing their misfortunes in the exceptional position of ~~i~~ntitling them to the peculiar favor of e Congress.

If this policy was sound it might lead to a preference as among claimants of equal rights, but it is an inadmissible assumption that those who were fortunate should forfeit their legal claims to the use of the government, Congress under such an erroneous construction could not be regarded as merely intending to confer what was taken from one class to making good the misfortunes of another, but as intending to retain it to enrich the public treasury, or to grant it as a benevolence to persons having no legal claim upon the fund. It follows that the only admissible construction of this act is, that it intended a preference to unfortunate insurers to have their claims first adjudicated and paid, and no more.

If the duty of this court in construing an act of Congress rendered it necessary to investigate the motives that, upon its passage, influenced individual legislators, and to effectuate the objects represented by such motives it is possible that conclusions might have to be reached different from those already stated. It might, in that case, be argued broadly that the act of 1874 was the product of an opinion and feeling hostile to the claims of fortunate insurers, and if it was answered that this opinion and feeling was not adverse to the claims of insurers, but merely to their assertion by those who had been fortunate in their dealings with war risks, the response would doubtless be that Congress was the supreme representative of the sovereignty and could do as it pleased, and that its will, though resting on passion and prejudice, is, if not out of conformity to the Constitution, the supreme rule of conduct for courts as well as citizens. This may be admitted, and yet passion and prejudice must take upon themselves the form of law before they can have the force of law, a circumstance most fortunate for civilization, for passion and prejudice usually display an inaptitude to assume the staid forms of law. If it were otherwise and we were compelled to grope in the minds of individual legislature for the intention of the act of 1874, if we found hostility to the claims of the fortunate insurers to be the animating motive of the individuals constituting the enacting majority, still the question would have to be answered why they did not in terms declare the claims of the fortunate insurers to be null and void in clear and unmistakable language. Two answers are possible to this question—one is, that it was currently believed that the claims had no legal validity independent of such provision as Congress might make for their allowance, and hence silence was effectual and the course least discreditable; and the other, that it was enough for Congress to intimate its disfavor and leave it to the courts to interpret the Congressional nod and drop the axe upon the claims.

Our political system, in constituting the judical functions of the nation as an independent branch of the sovereign authority and vesting them in the courts has created a barrier that largely confines the consequences of the errors and passions of the individual legislator to his own breast. Our legal system, based upon principles that remain fresh and vigorous, while statutes become old and fade away, and effective through its administration by an independent branch of the sovereign authority interprets an act of Congress as proceeding from rational motives, and thus the passions that so often disturb the legislative body expire at the bar of the courts as the force of the disturbed ocean exhausts itself in breakers upon the barrier that guards its shores.

If the legislative body erroneously assumed that without legislative help the fortunate insurers could never obtain that which the United States wrested from Great Britain in their name and behalf, it is not for this court to supplement their refusal of an act of justice by converting their erroneous conceptions of existing laws into law. If it was a assumed that to intimate ~~or~~ legislative feeling was sufficient to induce the courts to do that which the legislative body hesitated to do as wearing a discreditable aspect, that assumption lost sight of the fact that the courts are the equals, in their function, of the legislature in its function, and solely guided by the principles of the laws in interpreting the legislative will.

Section 15 of the act of June 23, 1874, after providing for the application of the specific fund to the payment of the judgments of the special court and its expenses, provides as follows: "And after the payment of the said judgments, and the reimbursement of the expenses as herein provided, if there shall remain any part of the said money, the same shall be, and remain, a fund from which Congress may hereafter authorize the payment of other claims thereon." The previous clauses of this section had directed the cancellation and extinguishment of the bonds that constituted the specific fund upon the completion of the work of the court and the payment of its judgments and expenses. It is apparent, then, that according to the intention of the act the specific fund was to be destroyed as such upon the accomplishment of the objects of the act of June 23, 1874.

The clause that has just been recited from section 15 is a concession that *other* claims than such as were provided for in that act existed; or in other words, that the act was intended to make provision for certain classes of claims only, and leave others for subsequent consideration, and was not intended as a final determination of what claims should be paid, and what claims should not be paid. The language referred to affords clear evidence that it was the intention of the act to confer preferences, and not to ascertain the legality of any class whatever.

We submit that the direct object and effect of the clauses cited from section 15 was to appropriate a sum of money in the Treasury equal to what might remain of the value of the specific fund, after the satisfaction of the objects of the act of 1874, to the general class of claimants to the fund, not preferred under the act of 1874, such appropriated sum to be applied to individual cases, as Congress might thereafter direct. Such a general appropriation was an acknowledgment that the United States was a general debtor for an amount equal to the balance of the specific fund, to such claimants as should legally establish their claims upon the same.

The effect of such a general appropriation was merely that of establishing a credit in favor of a class of claims on the general funds in the Treasury without producing the effect of placing any portion of those funds in a state of reservation, withdrawing them from other uses, and dedicating them to the particular use indicated.

It may be argued that the allusion to the further action of Congress has the effect to exclude from the benefits of this appropriation all claims that shall not obtain the direct sanction of Congress. It is by no means clear that the words of section 15, "from which Congress may hereafter authorize the payment of other claims thereon," necessarily imply that a direct legislative recognition was essential to future payments under such general appropriation. A liberal interpretation of the language under consideration might find them to express the idea that such claims must, before payment, be established under the authority of Congress, which would include claims established by the judgment of the Court of Claims. It is not necessary in the present case to solve the question just suggested. It is not necessary for claimants establishing claims in the Court of Claims against the United States as a general debtor, by reason of the matters alleged, to have recourse to the general appropriation made by the 15th section of the act of 1874, as the judgments of that court are otherwise provided for by appropriation, and hence the conditions annexed to such general appropriations do not affect them.

We submit that this court should hold that the clauses cited from section 15 should be allowed no greater effect than is due to a general appropriation with conditions annexed, for the reason, *first*, that such construction satisfies the direct expressions of the act, and, second, that to extend the intention to include a declaration that the claim of the appellant is invalid would be to destroy contract rights by an implication that is not a necessity of the expressions employed.

We submit, then, that the effect of the act of June 23, 1874, was to prefer the class of unfortunate insurers in the distribution of the specific fund, and to postpone the claims of the fortunate insurers until the fund was no longer necessary for the purposes of such preference. The creation of a preference among those equally entitled to the fund was inconsistent with the obligations of the United States, but as such preference was created in the exercise of the sovereign law-making power, it cannot be regarded by this court as a wrongful exercise of the powers of the United States, and hence no actionable wrong could arise out of it.

At the passage of the act of 1874 the claimants to the fund had no right of action against the United States as a general debtor, and that act precluded the origination of any such right of action until its purposes were accomplished. The creation of the specific fund, and a course of exclusive administration under it, would have displaced any antecedent remedy that might have existed, having special relation to such fund, and prevented the origination of any such remedy. A specific remedy granted to one class of claimants cannot displace a general remedy due to another class; but the creation of a specific fund and its appropriation to the payment of specific obligations must be regarded as an exclusive appropriation of such fund until such specific objects are satisfied. Even if such an appropriation is to be regarded as inconsistent with the legal rights of the claimants it cannot be complained of, as it is the act of the law-making authority.

NINTH PROPOSITION.

That the fund and course of administration to which it had been subjected continued to exist until the 31st of March, 1877, at which time the specific remedy by commission was at an end, and no other specific remedy was afforded to any claimant, and at which date, by the authority of Congress, the bonds of the United States that constituted said fund, and which at that time had not been disbursed to claimants under the judgments of the commission, were cancelled and destroyed, and the fund ceased to exist.

TENTH PROPOSITION.

That the destruction of the fund in question, and the non-existence of any specific remedy for the distribution of the moneys received, on the 31st day of March, rendered the United States liable as a general debtor to the amount of the sum received that had not been disbursed to claimants, and the claimants were entitled from that day to their action in the Court of Claims.

The 9th and 10th propositions will be considered together. Prior to the 31st day of March, 1877, the commission had ceased to exist, having been extended by act of June 22d, 1876, to January 1st, 1877. It is presumable that all the judgments of the Court of Commissioners had been paid, with the expenses, on or before the 31st day of March, 1877, for on that day the bonds that constitutes the specific fund were cancelled, in conformity with the act of June 23d, 1874. That act declares " upon the payments from time to time of the said respective judgments of said court, as before provided, the bonds of the United States, mentioned in the act approved March 3d, 1873, entitled,', &c, " shall be cancelled and extinguished, to the amount of such payments, and when all such payments shall have been made any such bonds remaining, shall be also cancelled and extinguished, and after the payment of the said judgment and the reimbursement of the expenses as herein provided, if there shall remain any part of the said money the same shall be, and remain a fund from which Congress may hereafter authorize the payment of other claims thereon."

The presumption in favor of the regularity of the acts of public officers warrants the inference that all the claims established under the act of June 23, 1874, were paid at the date just indicated. By the operation of that act all claims appertaining to the preferred classes, and not so established, were at that date barred and waived. We submit that on the 31st of March the specific fund and all means of administering it were at an end. Although the authority of law under which this result arose existed from the passage of the act of 1874, yet the conditions upon which that authority became effective did not occur until March 31st, 1877. While that authority contemplated an act tending to prejudice the rights of the claimants, yet the actual interference with their rights did not occur until March 31st, 1877.

We submit that the act of cancelling the funded bonds had, under the operation of that law, the effect:

First. To terminate all specific remedies extant, in favor of any class of claimants, and hence all interference with the general remedies, appropriate to the case, ceased at that time.

Second. The cancellation of the bonds relieved the United States of liability upon such bonds, and thus inured to the general benefit of the Treasury in the same manner as if an equivalent sum of money, due to the claimants, had been appropriated by the United States to its general uses.

Third. Such an act was, in substance, an appropriation of the private property of the claimants to public uses, giving rise to an action for money had and received.

Fourth. The act of Congress recognized the existence of other claims than those preferred, and an obligation on the part of the United States to pay from its general funds any such claims that might thereafter be established under the authority of Congress.

We submit that as the consequence of these propositions, the United States became liable to the appellants on the 31st of March, 1877, as a general debtor.

First. As a consequence of the general obligation of the United States to apply to the payment of the appellants their appropriate share of the fund received from Great Britain under the Geneva award.

Second. As a consequence of the appropriation of these funds of the United States to its general uses.

Third. As a consequence of the appropriation to its own uses of a specific fund to which the appellants had a definite proprietary right under the protection of the Constitution of the United States; and,

Fourth. As a consequence of the recognition of such obligation implied in the acts of 1873 and 1874.

The fact that no specific remedy existed for the appellant to which it was bound to resort, placed the appellant at liberty, on the 31st of March, 1877, to prosecute the United States in the Court of Claims for the purpose of establishing, under the authority of Congress, such demand against the United States upon their general indebtedness to appellant.

That the origination of such a cause of action was not prevented by the legislation to which reference has been made, appears from the fact that such legislation had no relation to the general obligatory relationship existing between the United States and the claimants; but exclusively related to the disposition that was to be made of a certain fund. Where, at the same time, a general indebtedness exists, and a specific fund for the discharge of such indebtedness, and by the act of the parties the specific fund is discharged from liability to the payment of the general indebtedness, the general indebtedness remains uneffected by such dealing. If, for instance, a mortgage exists securing an indebtedness, the release of the mortgaged property without satisfaction is not a discharge of the indebtedness, but a transaction independent of the general relationship of debtor and creditor between the parties. The United States being under an obligation to apply the proceeds of the Geneva award to the satisfaction of the appellant's claim, and at the same time holding a specific fund, out of which such payment should be made, legislation affecting the fund cannot be regarded, from that fact, as intending to affect the general relation of debtor and creditor sustained to the appellant. If the sense of a statute diverting a specific fund from its proper application to the payment of a particular indebtedness, to which it had been subjected, is to be extended so as to deny the existence of the indebtedness thus deprived of its security, that construction can only be reached by implication. Such an implication is not a necessary implication inasmuch as the destruction of the security is possible, without the destruction of the debt secured by it. Such an inference can only be reached by holding that the cancellation of the debt was reasonably intended by the act diverting the security, but as such an implication would have the effect to destroy contract rights, its reasonableness is not sufficient ground for inferring it.

We submit that the act of 1874 must be regarded as a dealing with the specific fund, and not as a legislative interference with the consequences produced by the principles of the law under the relationship between the United States and the appellant.

ELEVENTH PROPOSITION.

That the liability of the United States to all unsatisfied claimants, to the extent of the undistributed balance of the fund received, is admitted by act of Congress as a general liability of the United States to any claimants that should establish a claim under the authority of Congress, and as the Court of Claims exists by the authority of Congress, to any claimant that should establish any claim in that court.

This proposition reiterates that which has already been said in relation to the 15th section of the act of 1874. We submit that the words of that section, as follows: "The same shall be and remain a fund ~~for~~ which Congress may from hereafter authorize the payment of other claims thereon," are properly understood as a promise to pay unsatisfied claimants to the extent of the undistributed balance of the fund.

It is not to be presumed that these words meant that Congress would exercise an arbitrary discretion in regard to payment, for that being inconsistent with the public obligations, such construction is not reasonable.

It is not to be inferred that Congress intended by these words to displace the jurisdiction of the Court of Claims as to any claim capable of being prosecuted in that court, and substitute a legislative determination in its place, for that would be inconsistent with the policy of the law creating that court. If, on the other hand, the clause under consideration is regarded as simply a recognition of the obligations of the United States as it regarded the disposition of the fund, all difficulties of construction disappear.

TWELFTH PROPOSITION.

That the act re-establishing the Commission of Alabama Claims does not in express terms, or by necessary implication, take away any remedies previously existing, and to which this act is not applicable, or propound anything that can be a bar to the present action.

The act of June 5, 1882, re-establishing the Commission on Alabama Claims found the claimants, of the class to which the appellant belongs, entitled to a remedy against the United States as for money had and received, and did not by direct expression or by necessary implication affect or impair that remedy.

First. The remedy of the appellant is not a subject brought within the scope of that act.

Second. No specific remedy is allowed to the appellant, or to the class of claimants to which it belongs, so as to displace any general remedy.

This act re-established the Commission on Alabama Claims with the same jurisdictions and powers as those possessed under the act of 1874, except as modified by it. It divides the class preferred by it into two subordinate classes and establishes preferences between them. As to the classes to which this act gives a remedy it is only necessary to say that neither class is entitled to participate in the sum received from England as claims of that character were excluded by the Geneva tribunal from the damages allowed. That act does not confer any remedy upon the class of fortunate insurers of war risks nor negate any remedy that they might possess. We submit that it must be confined, as it regards its effect upon the class to which the appellant belongs to that which is expressly declared by it and to thet which is necessary implication from such declaration. That the only way in which it could impliedly take away the general remedy of the appellants would be by conferring upon them some remedy of a nature different from such general remedy, and this it has not done. A remedy conferred upon a subordinate class of a general class does not tend to impair the remedy of the classes not provided for.

In view of the matters set forth in the twelve propositions submitted, we submit that a cause of action cognizable in the Court of Claims as arising upon the assumption by the United States of a ministerial duty for the benefit of the appellant, and completed by the failure of the United States faithfully to perform such duty, and by the application by the United States of money due under that duty to the appellant, to its general uses arose on the 31st of March, 1877. That no act has been performed by the sovereign legislative authority destroying, impairing or suspending from that date that remedy. That while such remedy was in full vigor the petition was filed in the Court of Claims that is brought here by appeal. That at the commencement of such proceeding the United States held funds, derived from the Geneva award, sufficient to meet the demands of the appellant. That as a consequence of these facts the status of this case being fixd by the state of things existing at its commencement, it is entitled to proceed and the appellant to have judgment upon the case, as it stood at the time of its commencement, without regard to the condition of the fund at any subsequent time. It follows that the

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judgment of the Court of Claims is erroneous and should be set aside unless it is made to appear that the claim in suit arises out of or is dependent upon the stipulations of treaties with foreign nations or the Indian tribes.

The question that remains is whether the cause of action presented can properly be said to arise out of or to depend upon the stipulations of the Treaty of Washington, as that is the only treaty that can have any application to the case. We submit that the leading object of the clause that denies jurisdiction to the Court of Claims of contracts express and implied arising out of the public treaties or dependent upon them was to withhold from that court the adjudication of cases depending upon the treaty relations of the United States with foreign powers, the Indian tribes being assimilated to foreign nations in that respect. Had the jurisdiction thus withheld been conferred upon the Court of Claims that tribunal would have to be regarded as an international as well as a domestic forum. That international questions should be withheld from that court can be readily understood, as its constitution fits it alone for the adjudication of cases between the United States and private individuals.

Without this clause there would be nothing to prevent a foreign nation from prosecuting the United States in its own court for the non-fulfillment of treaty obligations. If the constitution of a domestic court was adapted to such a purpose it would be difficult to find a reason why such a mode of settling international difficulties should not supersede the existing methods, but, obviously, Congress did not intend that such a jurisdiction should exist.

Assuming the object just stated to be the primary object of the clause under consideration it had no relation to claims made by citizens of the United States against that power as an individual, being neither a party nor a privy to a public treaty, could not under any circumstances maintain an action upon it. The clause was, then, primarily intended to act against those occupying a position enabling them to claim the fulfillment of treaty obligations. We submit that there is nothing in the statute tending to extend the force of the clause under consideration beyond the scope indicated by its primary object. Such an extension as that, which would exclude the present case from the Court of Claims, would be without reason, as will readily appear.

As it regards the present cause of action, the Treaty of Washington only contemplated three things: *First*, the establishment of a judicial body to adjudicate certain demands against Great Britain; *second*, the time and mode of payment to the United States of any sum awarded by the tribunal; and, *third*, the extinguishment of the class of claims to which the treaty related in the event of the fulfillment of the other object of the treaty. The tribunal was established and proceeded to final judgment in a class of claims, the money was paid, and the whole class of claims to which the treaty related extinguished. So far as it concerns the present cause of action the stipulations of the treaty were fully performed.

After such performance it was impossible that any cause of action should exist arising out of or dependent upon the stipulations, as the extinction of such stipulations absolutely prevented anything from arising out of them; and that which depended upon them could have no existence after they ceased to exist. If it is possible to say that the present cause of action arose out of the Treaty of Washington, or depended upon that treaty, it is not possible to say that such origin or dependence was upon the stipulations of that treaty. As an historical fact the Treaty of Washington may exhibit a train of circumstances of endless duration, but as an obligation between Great Britain and the United States it lost the capacity of giving rise to legal consequences at the moment of full performance. The obligation of the United States, arising from the fact of the receipt of the money awarded, arose in consequence of the prior fulfillment of the treaty, and would not have existed had not the treaty been performed.

The present cause of action arose years after the final fulfillment of the treaty, at a time when its stipulations had no legal existence. The foundation of the appellant's right lay in the legal consequences of the assumption by the United States to enforce the claim of the appellant against Great Britain prior to the existence of the Treaty of Washington. That treaty was part of the means adopted to enforce their claims. The money when it came to the United States was the fruit of the claims that had been prosecuted by means of the treaty, and not of the means employed. The misapplication of the fund was an act of wrong entirely independent of the treaty, its stipulation and consequences. It was out of this act of misapplication that the implied contract arose that is the subject of the present controversy. The substance of the cause of action is an implied promise to pay, made on the 31st of March, 1877, a fact entirely disconnected from the Treaty of Washington, and arising many years after the stipulations of that treaty had passed out of existence.

Had the language of the act defining the jurisdiction of the Court of Claims excluded from that jurisdiction causes of action *either directly or indirectly* arising out of, or dependent upon, the stipulations of treaties, the present case could not be regarded as excluded, inasmuch as it did not in any sense arise out of or depend upon those stipulations, but we submit that there is no ground for reading that clause as if the word "indirectly" was included in it. The primary object of the clause, as has been seen, is satisfied by confining it to cases arising *directly* out of, and dependent *directly* upon, the stipulations of treaties, and there is nothing whatever in the statute that can extend its sense beyond this primary object.

We submit that the present cause of action arose wholly out of relations between the United States and the appellant, and depends wholly on the conduct of the United States relative to the appellant—the treaty and all that was done under it being purely incidental to the legal consequences of that relationship.

The questions that have been discussed in detail involve the principles of construction as applied to the remedial system adopted by Congress for the ascertainment of the obligations of the United States towards individuals, and to the specific remedies afforded to certain classes of those claiming to participate in the Geneva award. Our argument rests upon the proposition that that general remedial system should be liberally construed as within the familiar principle that remedial acts should receive a liberal construction. If the act conferring jurisdiction upon the Court of Claims is thus liberally construed the consequence would follow, as already pointed out, that the same principles and rules that govern the implication of contracts as between individuals would apply to the contract relationships of the United States to individuals, modified in their application by what is demanded by the sovereign character of one of the contracting parties.

One of the consequences of a liberal construction of the general remedial system would be that the exceptions to the jurisdiction of the Court of Claims would have to be construed in such manner as to attain the special objects of such exception, without encroaching upon the completeness of the general remedial system. Under such a rule of construction the exclusion of causes arising out of, or dependent upon, the stipulations of treaties would be confined to limiting the authority of that court to that proper to a domestic tribunal, and excluding it from exercising powers of an international character. This would leave the domestic jurisdiction of the court full and prevent that defect of jurisdiction that would result if all obligations of the United States incidentally connected with the subject matter of treaties were removed from its cognizance. Another consequence of a liberal construction of the general remedial system would be, that acts of Congress would not be enlarged in their operation upon the principles of implication so as to encroach upon that system, but wherever a construction of an act of Congress would tend to replace a judicial determination of the state of the obligations of the United States to an individual by a legislative declaration, such a construction would not be allowed unless compelled by the express language of such act, or unless it is a necessity of the effectiveness of the act. Thus it is apparent that the whole argument ultimately depends upon the question whether the remedial system established through the jurisdiction conferred upon the Court of Claims is entitled to be liberally construed.

That the enlightened judgment of the most advanced people's has become adjusted to the idea that the obligations of sovereigns rest upon definite civil sanctions, and should be judicially ascertained is a fact that will not be disputed. A tendency prevails at the present day to extend the judicial system to the extent thus indicated. The technical objection that it was beneath the dignity of a sovereign to be sued in his own courts is rapidly giving away under the influence of the idea that it is the noblest trait of sovereignty to inquire into its obligations by judicial methods rather than to solve them according to its caprice or conveniece. It is to the sovereign himself sitting in his courts that the appeal for justice is made, and therefore so far from there being a loss of dignity in such an attitude to his subject, it represents the most exalted relation in which man can participate.

The conviction has become general that it is impossible for bodies constructed for the discharge of legislative functions to perform judicial acts in a judicial spirit, and that such attempts have a corrupting influence upon the legislative body. Statesmanship, if unable to grasp the proper conclusions from the principles of justice, is, at all events, capable of discerning the disastrous effect upon government of uniting in the same body the exercise of legislative and judicial functions. While the general truth ^ that legislative and judicial functions ought to be committed to distinct and independent bodies, specially organized for the respective purposes, yet the truth was slow to be perceived

is recognized,

that the ascertainment of the obligations of a sovereign to his subjects was essentially a judicial act.

The creation of the Court of Claims was a great step of civilization leaving to history another relinquished feature of barbarism. It is true that the step was partial, and in part denied the force of the principles upon which it rested, but at all events it involved the recognition of the principles, and created a valuable jurisdiction.

The question of enlarging that jurisdiction, so as to express complete compliance with the demands of justice, is one that must be presented to the legislative authority, while that of conserving that which has already been attained is that which is presented to this court this day. It is not too much to say that this case touches fundamentally the principles upon which the remedial system as affecting the obligations of the United States rests.

The appellate jurisdiction of this court casts upon it the responsibility of maintaining that great feature of the judicial system that gives sanctity to the obligations of a sovereign. This court stands forth as the embodiment of the reason and conscience of the nation. While the nature of legislation demands that the legislative body shall be the forum in which national and individual, general and local, interests shall strive for mastery, this court, as a judicial body, habitually deals with past transactions, interpreting them and harmonizing them with the principles of justice and the rules of conduct sanctioned by prolonged experience, and drawing their proper consequences. It is a higher function to discern ones duty than to propound that which is due to his interest, and the institution that embodies this exalted function must be regarded as in a preeminent sense the conservator of the highest class of national interests.

It is fortunate for the vast interests involved in the present case and question that the organization of this court is favorable for the performance, in a complete spirit of independence, of the important duties devolved upon it at this time. It is the only national court existing that is independent of the executive and legislative authority in a full sense. Its foundations are laid in the Constitution itself, and it cannot be shaken by any wave of passion that may chance to sweep the legislative halls, or by executive policy or caprice. To a court thus independently constituted it is safe to commit the most important interests of mankind. The antecedents of this court are an inspiration to your honors. At that day, when the United States, covering a large area, sparsely inhabited, with little governmental cohesion, and torn by factious differences, was agitated by the question whether its recently adopted Constitution contained a or national idea~~—~~that of a dissolvable federation~~—~~this court rose ? above all fears of political dissolution and disaster to its own jurisdiction, and uttered the words that made many peoples a single people, and a community of jealous States a nation.

A duty no less imposing than that which in its result cemented this union of States is presented to this court by the legislation of Congress now under consideration. A complete national system of remedies for the subject against his sovereign is the initial step towards a system that shall extend judicial means to the controversies between sovereign and sovereign, and sovereign and subject, the world over. If this court has in the past solidified national interests, it is not too much to claim for it that it may yet render possible conditions under which nations may be united by a system expressive of Christian civilization, replacing force by reason as a means of adjusting national differences. Not only does the present question touch the existence of complete means of ascertaining the obligations of sovereignty, and thus holds the way towards a larger interpretation of the judicial function, but it involves the question whether attempts to solve international differences by judicial means shall be fruitful or fruitless.

The Geneva arbitration was an instance of an attempt to arbitrate national differences by reason instead of force. The question in this case is whether the direct object for the sake of which that tribunal was created is possible of attainment. If the decision of international tribunals cannot be carried into efficacy, the system must fall into discredit. It is contended, in behalf of the United States, that it is under no obligation to give efficacy to the judgment of the arbitration. It is an undeniable fact that the adjudication of that body was upon the claim of private citizens of the United States against Great Britain, and that its judgment established such private right. That judgment has been satisfied, and its proceeds are in the hands of the United States. A court of exalted position has declared that the United States, as a sovereign, is under no obligation recognizable by the law to deliver the fruits of that litigation to those who have earned them. If this be true, then an international judicature is not adequate to the redress of the citizen of one nation against the sovereign of another, and war must remain as the only practical solution of such question. It is not then too much to say that the interests of international judicature are in a large sense before the court in this case.

While it is conceded that the clear expression of the legislative will of the nation is a bar to the authority of this court to perform the most needed act of justice, yet no legislation appears that can produce such an effect, unless its force is expanded by implications. If the reasons upon which this court is asked to enlarge the sense of statutes to defeat the ends of justice is narrowly examined it will appear to rest on the fact that Congress in dealing with this question has exhibited an unwillingness that the money received by the United States shall go to the parties for whose benefit it was awarded. It is true that Congress has not so declared, and, indeed, has carefully avoided making such a declaration, and the argument must rest contented with the general statement that the *animus* of Congress was hostile to the class of claims to which that of the appellant appertains.

If it be said that Congress expressed its intention by excluding a certain class of insurers from a specific remedy afforded by means of the commission, the reply is, that that is all that Congress has expressed, and leaves the general remedy unaffected by the action of that body.

In conclusion, we ask your Honors to give us the benefit of those rules and principles that constitute the body of our laws, and we are satisfied that the judgment of this court will reverse that of the Court of Claims, and place us in the course of establishing our demand against the United States.

E. G. Ree
A. J. Willard

APPENDIX.

The revised tables presented by the agent of the United States (Papers Relating, &c., Vol. 4, p. 41) present the amounts claimed adjusted to the rulings of the tribunal:

The private losses are stated at	$14,437,143.51
To this is added claims for prospective profits	4,099,302.50
Making the claims for private injuries	$18,536,446.01
Add to this the claims of the United States for general damages	6,735,062.49
Making the total claims of the United States for public and private damage	$25,271,508.50

The amount stated in the summary of the original tables (Papers Relating, &c., Vol. 3, p. 632) is the aggregate of private claims as follows,

follows,	$15,530,434.00
Prospective profits	4,009,302.50
Total of private claims	$19,539,736.50
Claims for public damages	6,735,062.49
Total	$26,274,798.99

Amount claimed in original tables, irrespective of prospective profits	$15,530,434.00
Amount as stated in revised tables	14,437,143.51
Difference between original demand and revised demand	$1,093,290.49

This difference is accounted for as follows: The revised tables reduce the amount claimed from the Shenandoah, retaining the original claims as to the Alabama and Florida.

It thus appears that the item of $14,437,145.50 contains solidly the original claims of private claimants on account of the Alabama and Florida and part of the amount claimed for the Shenandoah.

The amount of insurance claimed on account of the Alabama and Florida as obtained from the American tables, volume 3, beginning p. 583, is $4,319,080.01, and this amount is included in the item of $14,437,143.51. In addition to this claim for insurance the last-mentioned sum contains a claim for insurance on account of the Shenandoah that has not been computed.

112-193

SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1884.
No. 835.

GREAT WESTERN INS. CO., APPELLANT,
against
THE UNITED STATES.

BRIEF FOR APPELLANT.

STEPHEN G. CLARKE, } *Of Counsel.*
EDWIN B. SMITH, }
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Supreme Court of the United States,

OCTOBER TERM, 1884.

GREAT WESTERN INS. CO.,
Appellant,

AGAINST

THE UNITED STATES.

No. 835.

BRIEF FOR APPELLANT.

Statement.

The petition herein was filed in the Court of Claims March 30, 1883, and on the 12th day of May the Attorney-General filed in that Court his motion to dismiss the same for want of jurisdiction.

The substance of the case made by the petition is that the petitioner insured various vessels during the war of the rebellion, which vessels were captured or destroyed by the Confederate privateers *Alabama* and *Florida*, by reason whereof the petitioner became liable to and did pay the sums insured to the owners, who were American citizens.

That the Kingdom of Great Britain became liable for the payment of such losses; and that by the force of assignments as well as by the law of subrogation these claims belonged to the petitioner.

That the petitioner made claim therefor against the Government of Great Britain, and the same was presented by the United States and payment demanded in behalf of the petitioner.

That said claims were considered and allowed by a special tribunal of arbitration, and the amount as found by said tribunal paid by said Great Britain and received by the Secretary of State of the United States, and invested by him in trust. That subsequently the United States took to its own use said trust fund, including the accrued interest, and that the claim of the petitioner has not been paid or satisfied.

The gist of our petition is the receipt by the United States of money to which the Insurance Company was and is legally entitled.

The petition was dismissed by the Court of Claims, upon said motion, for want of jurisdiction, and the petitioner took this appeal.

BRIEF.

I.

The petitioner founds his claim to be heard in the Court of Claims upon section 1059 of the Revised Statutes, giving that Court jurisdiction "upon any contract, expressed or implied."

By paragraph seven of the petition, it appears the United States, through the Department of State, requested the petitioner to prepare its claim for presentation by the United States to Great Britain. It did so. The United States presented it, and eventually received payment therefor and now holds the money.

On these facts, it is submitted that no element of an implied contract is lacking. "Implied contracts are such as reason and justice dictates, and which, therefore, the law presumes every man undertakes to perform."

Bouvier L. Dict., *verb.*, contract, 10.

As between individuals upon such a state of facts, an action of *assumpsit* for money had and received would lie.

KENT, Ch. J., as long ago as 1811, in an analagous case, said:

"If France should, at any future period, agree to and actually make compensation for the capture and condemnation in question, the Government of the United States, to whom the compensation would, in the first instance, be payable, would become trustee for the party having the equitable title to the reimbursement;" and, as he held, this would be the insurance company, if it paid the loss.

Gracie vs. New York Ins. Co., 8 Johns., 237, 245.

Question as to the rights of the petitioner by subrogation, we think, cannot arise under this motion; but if so, these rights seem to us too clear to require argument or the citation of authorities.

The opinion of the Court of Claims recites our petition; but follows it with the observation (Record 10, near top) that "the case can be substantially stated in a few words."

We respectfully submit that so much of our case as makes out a cause of jurisdiction—as sustains our right to be heard, irrespective of the evidence to be adduced upon the hearing—can be stated in even fewer words than are there employed.

What we assert is that Great Britain was, upon established legal principles, bound to pay the petitioner a specific sum as indemnity for an injury inflicted upon the Ins. Co. through the action of that country; that we might have presented our petition of right in her Courts to obtain it; that our Government did, for and on account of that particular claim and injury, receive from Great Britain the specific sum to which we were and are entitled by reason of that injury to us; and that *from the mere reception of our money* (omitting all immaterial incidentals and details, beyond the fact that all the circumstances, especially our title, were known to the recipient when the money was taken) an implied contract arose—not out of any treaty, but from universally admitted principles of law—to pay the money so received to us.

The substance of our contention is that whatever facts, transpiring between individuals, would raise, in any other tribunal, the implication of a contract to pay money between them, raises the same implication against the United States in the Court of Claims; in other words, that Court has jurisdiction to hear, consider and pass upon—as between the Government and the citizen—that state of facts, alleged or proved to exist, which, as between man and man, would sustain an action *ex contractu*. This must be the meaning of R. S., Sec. 1059, quoted *supra*.

Langford vs. U. S., 101 U. S., 343, bottom.
James vs. Campbell, 104 U. S., 358–9.
Campbell vs. U. S., 107 U. S., 413.

In this view, all that is said of the *agency* of our Government in presenting the claim, &c., &c., becomes of little, if any, importance, except as showing that *it took the money* with knowledge of our title and for us.

That the United States is a sovereign does not affect the question. If it chose not to be sued at all its sovereign will, expressed through Congress, could debar everybody of the right to sue it; but when, on the contrary, it permits suit, it permits the sovereign to be sued and judgment to be had against it, whenever the prescribed state of facts is shown, whether those facts indicate sovereign action or not; and it is for the judicial, and not the legislative, department to ascertain and declare whether or not the facts prescribed exist.

The right to sue in the Court of Claims is not a mere favor bestowed; because, "It is as much the duty of the government as of individuals to fulfil its obligations," whether these are expressly acknowledged under seal or arise as a legal conclusion from proven facts.

Klein's Case, 13 Wall., 144.

We do not deem it worth while to follow the Government in an examination of English cases, because this is purely a question as to the power conferred by our statutes upon the Court of Claims. We may say that the cases cited below did not, in their facts or law, have the application to this contended for by the counsel there representing the United States.

This is obvious as to De Bode's case.

As to Rustomjee's case, it may be noticed that the moneys paid over were expressly limited to those debts ascertained and declared by the Cohong; and that Rustomjee's claim had never been admitted or established by the Cohong! Lord Coleridge, C. J., upon the appeal, states and lays stress upon the circumstance that the petitioner's claim had never been ascertained.

Something is said in those cases to the effect that the Queen cannot be made trustee of the subject. Klein's case (13 Wall., 138, bottom), and the host of cotton claims subsequently decided, show that Congress can and has made the United States a trustee for its citizens; and, as we say, has made it so in every instance where similar facts would establish that relation between individuals.

Lamar vs. Browne, 92 U. S., 195, top.
Young vs. U. S., 97 U. S., 61, last line.

It is long since settled that if all there is left of the trust is the payment of money by the trustee to the *cestui que trust*, suit in the nature of an action for money had and received will lie therefor.

The statute of limitations does not run against the Trustee of a fund until he disavows, or refuses to execute, the trust, or converts or misapplies the fund.

U. S. vs. Taylor, 104 U. S., 222.

II.

But the statute (Rev. Stat., § 1066) provides that the jurisdiction of the Court of Claims shall not extend to claims against the Government "growing out of or dependent on any treaty stipulation;" and it is argued that the claim here is within the exception.

Our first suggestion upon such contention is, that the facts of our claim are such that we are enabled to present a petition stating a case, which if true, entitles the petitioner to recovery, and that from beginning to end no allusion to a treaty can be found. No claim is made in the petition, based upon any treaty. To discover a treaty the counsel for the United States must go outside the statements of the petition.

The limitation of the jurisdiction of this Court is in respect to claims growing out of or dependent upon treaty *stipulations*.

Webster defines "stipulation" in law as "a material article of an agreement," and gives as synonyms. "covenant, agreement, contract, engagement."

"The principal mode of engagement, which in the Roman law dispensed with an actual consideration, was a stipulation. The person to whom the promise was to be made proposed a question to him from whom it was to proceed, fully expressing the nature and extent of the engagement; and, the question so proposed being answered in the affirmative, the obligation was complete. It was essentially necessary that both parties should speak; that the person making the promise should answer conformably to the specific question proposed, without any material interval of time, and with the intention of contracting an obligation. From the general use of this mode of contracting, the term stipulation has been introduced into common parlance, and in modern language frequently refers to any thing which forms a material article of an agreement; though it is applied more correctly and more conformably to its orignal meaning to denote the insisting upon and requiring any particular engagement."

Evans' note to Pothier, 2 Evan's Pothier on Obligations, 19.

The terms "growing out of" and "depending upon" are equally significant. They are the equivalent of "founded upon" or "arising in."

The true construction of the inhibition limits it to claims upon contracts expressed or implied, founded upon an express agreement contained in a treaty.

In other words, if in any treaty is found an agreement or stipulation by virtue of which a citizen claims that the United States should pay him money, that claim is one which, by the statute, the Court of Claims is inhibited from passing upon, but it is respectfully submitted the limitation extends no further; *e. g.*, if by a treaty between Great Britain and the United States the latter should stipulate to pay, for instance, the Hudson Bay Company a million dollars; a claim in behalf of this company would be within the statutory limitations.

The claim must immediately grow out of the treaty stipulation.

III.

I am aware that there was the treaty of Washington. It created a tribunal of arbitration to pass upon various claims. Its life, its power was at an end when that tribunal did its work. That we claim by reason of a payment to the United States in pursuance to an award of that tribunal, does not make our claim one depending upon a treaty stipulation. A suit upon a judgment of a Circuit Court of the United States is not a suit "growing out of or dependent upon" the Act of Congress creating that Court: and yet, if the Act of Congress had not been passed, the Court could not have heard the issue and no claim could ever been based upon its judgment.

Say the Supreme Court: "One nation treats with the citizens of another only through their government. A sovereign cannot be sued in his own courts without his consent. His own dignity, as well as the dignity of the nation he represents, prevents his appearance to answer a suit against him in the courts of another sovereignty, except in performance of his obligations, by treaty or otherwise, voluntarily assumed. Hence, a citizen of one nation wronged by the conduct of another nation, must seek redress through his own government. His sovereign must assume the responsibility of presenting his claim, or it need not be considered. If this responsibility is assumed, the claim may be prosecuted as one nation proceeds against another, not by suit in the courts, as of right, but by diplomacy, or, if need be, by war. It rests with the sovereign against whom the demand is made to determine for himself what he will do in respect to it. He may pay or reject it; *he may submit to arbitration*, open his own court to suit, or consent to be tried in the courts of another nation. All depends upon himself."

United States vs. Deikleman, 92 U. S., 520, 524.

IV.

The Great Western Insurance Company insured vessels and cargoes of American citizens, taking war risks. The *Alabama*, a Confederate cruiser, fitted out in Great Britain, and by the *laches* of the government of that country enabled to escape and to commit depredations on the high seas, destroyed these vessels. The company paid the loss and became subrogated to the rights of the assured to recover the damage from Great Britain.

In 1865 the United States invited the petitioner to prepare and verify its claim against Great Britain, and through the Department of State undertook its collection from Great Britain.

In all this there is no suggestion of a treaty. What was subsequently done resulted, as the petitioner alleges, in Great Britain paying a portion of the petitioner's claim to the Secretary of State of the United States. The money received by the Secretary (being the claim of this petitioner and of others similarly situated), that officer invested and held in trust—in trust, we submit, for those on whose account the money was received. Some of this money was distributed, but after some years the remainder with accumulated interest, was seized by the United States and covered into the Treasury.

To determine the right of these petitioners, no treaty stipulation need be passed upon. None is stated in the case, and if upon the evidence the petitioner does not make out his case without bringing in a treaty stipulation, upon which it depends, or which it grows out of, the Court of Claims would then be bound to reject the claim. If, however, it does on the evidence make out a case, irrespective of treaty stipulations, it is entitled to the judgment of that Court.

How, upon the petition, can this Court *now* say that the petitioner will not make out such a case; or could the Court of Claims so say?

STEPHEN G. CLARKE,
EDWIN B. SMITH,
Of Counsel.

112-193

Office Supreme Court U.S.
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SUPREME COURT OF THE UNITED STATES.

JOHN P. PAULISON, ~~Secretary~~ Surviving and Sole Receiver of the
Columbian Insurance Company,
Appellant,
against

THE UNITED STATES,
Appellee.

BRIEF FOR APPELLANT

JOHN McDONALD,
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C. G. Burgoyne's "Quick" Print, 146, 148 & 150 Centre Street, N. Y.

SUPREME COURT OF THE UNITED STATES.

JOHN P. PAULISON, surviving and sole Receiver of the Columbian Insurance Company,
Appellant,

AGAINST

THE UNITED STATES,
Appellee.

No. 836. Appeal from the Court of Claims.

BRIEF FOR APPELLANT.

Statement of Contents of Petition.

The appellant, John P. Paulison, surviving and sole Receiver of the Columbian Insurance Company, filed his petition in the Court of Claims on the 30th day of March, 1883, setting up that the Columbian Insurance Company was a corporation duly organized under the laws of the State of New York; that it failed in January, 1866; that various persons had theretofore been appointed Receivers, who had either resigned or died, and that he is the sole surviving Receiver of the said company, and that he filed said petition under the direction or the Supreme Court of the State of New York; that said company was duly dissolved by a decree of said Court in February, 1866, and that by force of said decree of dissolution and the orders appointing the Receivers named in the petition, they and their successors in the trust became, and by virtue of the laws of the State of New York, are absolutely vested with all the interests of said company and possessed of its title, legal and equitable to all of its assets and property. That said company was organized for the purpose of carrying on the business of marine insurance. That during the years 1862, 1863, 1884 and 1865 it issued various policies of insurance on vessels, freights, cargoes and property of the persons and parties stated in the exhibit accompanying the petition (p. 1 of Record). That said vessels, cargoes, freights and property were insured against the acts of Confederate cruisers, which were then engaged in active hostility on the high seas against the United States. That the cruisers, the *Alabama*, the *Florida* and the *Shenandoah* after she left Melbourne, with their tenders, were such Confederate cruisers and destroyed the ships and cargoes specified in the petition, which became by such destruction a total loss to their owners, and the said company was compelled to pay and did pay to the persons and parties who had insured with it said vessels and cargoes, or parts thereof, sums of money amounting in the aggregate: for the destruction thereof caused by the *Alabama*, to the amount of $289,226; for the destruction caused by the *Florida*, to the amount of $221,727, and by the *Shenandoah*, after she left Melbourne, to the amount of $64,050 (p. 2 of Record).

That upon payment of said losses the various parties insured as aforesaid assigned to said company all their claim and right to recover the amount of the loss sustained by them from the persons or Government who had wrongfully or negligently caused the destruction of their property through the acts of the said cruisers.

That the *Alabama*, *Florida* and *Shenandoah* (after she left Melbourne, in Australia), had been armed, equipped and fitted out in the ports of Great Britain, a neutral power in the contest which the United States was waging to suppress the rebellion of the Confederate States against its authority. That this preparation of these cruisers for warlike service against the United States and its citizens was knowingly permitted by the authorities of Great Britain, in violation of that neutrality which theretofore had been established by the principles of international law, and which should have governed Great Britain in her relations to the United States and its citizens. That by this neglect, misconduct and wrong-doing on the part of Great Britain, that Government caused the destruction of the property of the persons and parties insured in said Columbian Insurance Company, and became liable to pay to the said insured persons and parties the losses which had been occasioned to them by the three Confederate cruisers.

That in view of this liability on the part of Great Britain, the Secretary of State of the United States, under proper authority, called upon the Receivers of said company, among others, to file in the State Department a statement of its claims, as such Receivers, against Great Britain, with proof of the same, in order that the United States might collect them from that Government for the Receivers of said company. That in pursuance of said request, the Receivers of said company delivered to the United States statements of all the losses it had paid to the insured, as set forth in said petition, with proofs of the terms and conditions of the payment of said losses, and of the assignment to said company of all claims on the part of the insured for reclamation from Great Britain, upon acceptance of which the United States agreed with the Receivers of said company to collect the said claims from Great Britain for the Receivers of said company, and upon demand to pay over to the said company or its representatives all moneys that might be collected from that Government on account of said claims (p. 3 of Record).

That such proceedings were then taken by the United States for the collection of said money that on the 9th day of September, 1873, Great Britain paid to the United States the sum of $15,500,000 on account, among others, of the aforesaid claims of said receivers.

That in the fund so received Great Britain included a sum sufficient and intended to reimburse the Receivers of said company for the amount paid by it to the insured owners as aforesaid for the losses which they had suffered by the acts of the Confederate cruisers, together with interest at the rate of six per cent. per annum on the amount of loss sustained by each insured party or person from the date of the destruction of his property. That under the contract entered into between said company and the United States when the latter received the aforesaid claims for collection, the United States received the said fund charged with the obligation and duty of accounting and paying over out of the same, upon demand, to the said insurance company or its Receiver or Receivers such a sum as would compensate the said company for the amount of losses for which it had been compelled to make indemnity to the insured owners aforesaid through the depredations of the *Alabama*, *Florida*, and the *Shenandoah*, after leaving Melbourne. That when the money had been received by the United States it was by act of Congress invested in a bond bearing five per cent. interest for the benefit of the parties entitled thereto. On the 31st of March, 1877, this amount was by the Secretary of the Treasury covered into the Treasury of the United States, less the sum which had been paid to persons and parties uninsured, for losses inflicted by said cruisers.

Notwithstanding the United States was bound by its contract to account and pay over to the said company, or its Receiver or Receivers, the money so collected for said company, it has wholly refused so to do, and did on the 31st March, 1877, convert said fund to its own use by making it a part of the general funds of the Public Treasury.

That no assignment or transfer of the aforesaid claims, or any part thereof, or of any interest therein, has been made except as stated in said petition; and the petition thereupon prayed for judgment for the sum of $876,845, with interest at the rate of five per cent. per annum from January 1st, 1874, to which said Paulison, Receiver as aforesaid, claims he is justly entitled, after allowing all just credits and off-sets, for which amount the petitioner prays judgment (p. 4 of Record).

That on the 28th May, 1883, the United States filed a motion to dismiss the petition for the reason that it did not disclose a cause of action within the jurisdiction of the Court of Claims. Argument was heard thereon on the 6th and 7th of February, 1884, and the motion was submitted. At the same time a motion was made and argument heard in a similar case, which had been brought by the Great Western Insurance Company against the United States on precisely the same state of facts as is alleged in this petition, and the motion in this case to dismiss the petition was granted on the opinion of the Court rendered in the case of the Great Western Insurance Company (p. 8 of Record).

Point I.

THE NATURE OF THE JURISDICTION CONFERRED BY SECTION 1059 of THE REVISED STATUTES AS ASCERTAINED BY JUDICIAL DECISION.

The motion to dismiss is in fact a demurrer, and is based on the ground of the want of jurisdiction in the Court to hear the case. Section 1059 of the Revised Statutes provides that

> "The Court of Claims shall have jurisdiction to hear and determine the following matters:
>
> "All claims founded upon any law of Congress or upon any regulation of an Executive Department, or upon any contract,

> express or implied, with the Government of the United States, and all claims which may be referred to it by either House of Congress."

So far as the question involved in this part of the discussion is concerned it is only necessary to consider that portion of the section above quoted. The appellant maintains that his claim to a portion of this fund grows out of an implied contract between the Receivers of this company and the United States. This Court and the Court of Claims have repeatedly inquired into the meaning of this provision, and have given it construction.

In United States vs. Russell (13 Wallace R., 630), the action was brought in Court of Claims against the Government for the use of a certain steamer of which the United States had taken possession under a military emergency and used for a certain time. The Court said:

> "Beyond doubt such an obligation raises an implied promise on the part of the United States to reimburse the owner for the use of the steamboat and for his own services and expenses. * * * *Indebitatus assumpsit* is founded upon what the law terms an implied promise on the part of the defendant to pay what in good conscience he is bound to pay the plaintiff, but the law will not imply a promise to pay unless some duty creates such obligation, and it never will sustain any implication in a case where the act of payment would be contrary to duty or contrary to law. Tested by these rules, it is quite clear that the obligation in this case to reimburse the owner of the steamboats was of a character to raise an implied promise on the part of the United States to pay a reasonable compensation for the service rendered."

In Smoot's case, 15 Wallace R., 45, it is said in the opinion:

> "There is in a large class of cases coming before us from the Court of Claims, a constant and ever-recurring attempt to apply to contracts made by the Government and to give to its action under such contracts a construction and effect quite different from that which courts of justice are accustomed to apply to contracts between individuals. There arises in the minds of parties and counsel interested for the individual against the United States a sense of the power and resources of the Government, prompting appeals to its magnanimity and generosity, to abstract ideas of equity coloring even the clearest legal argument. Their proper theatre is the halls of Congress, for that branch of the Government *has limited the jurisdiction of the Court of Claims to cases arising out of contracts, express or implied*

> *—contracts to which the United States is a party in the same sense in which an individual might be and to which the ordinary principles of contracts must and should apply.*"

In Langford vs. United States, 101 U. S. R., 341, in the opinion it is said,—

> "The jurisdiction of the Court of Claims has received frequent addition by the reference of cases to it under special statutes and by other changes under the general law, but the principles originally adopted, of limiting its general jurisdiction to cases of contract remains. There can be no reasonable doubt that the limitation to cases of contract, express or implied, was established in reference to the distinction between actions arising out of contracts, as distinguished from those founded in torts which is inherent in the essential notion of judicial remedies under all systems, and especially under the system of the common law. * * * This policy is founded in wisdom, and is clearly expressed in the act defining the jurisdiction of the Court; and it would ill become us to fritter away the distinction between actions *ex delicto* and actions *ex contractu* which is well understood in our system of jurisprudence, etc."

In Knote vs. The United States (95 U. S. R., 156), it is said in the opinion:

> "The claims here presented rest upon a supposed implied contract to pay to the claimant the money received as the proceeds of forfeited property. *To constitute such a contract there must have been consideration inuring to the United States, or they must have received the money charged with the duty to pay it over, or the claimant must have had a lawful right to it when it was received*, as in the case of money paid by mistake."

These decisions of the Supreme Court establish that in ascertaining whether an implied contract exists between an individual and the United States, the rules shall govern which apply in cases between individuals. The fact that it is the Government that is sued is not an element to be considered in the inquiry. It has waived its sovereignty and for the purpose of the suit has become an individual. The language in Cooke vs. the United States (91 U. S., 398), in a case where the United States was a party to commercial paper, is:

> "If it (the United States) comes down from its position of sovereignty and enters the domain of commerce, it submits itself to the same laws which govern individuals there."

To paraphrase it, if the United States comes down from its sovereignty to become a defendant in Court, it submits itself to the same laws and rules which govern individuals there. If out of the circumstance as between individuals the law will imply a contract, it will make the same implication between an individual and the United States.

In the case of *Bank of Boston vs. The United States, 10 Ct. of Claims R. 545*, an action was brought against the United States for the value of gold certificates received by United States officers and embezzled by them. In the Opinion of the Court, it was said:

> " The true character of this action is that of a common law " action of *assumpsit* for money had and received. In its spirit " and object it has been likened to a bill in equity, and it lies " wherever the defendant has received or obtained possession of " the money of the plaintiff, which in equity and good conscience he ought to pay over to the plaintiff. *And in order " to support the action there need be no privity of contract between " the parties except that which results from one man having another's money, which he has not a right conscientiously to retain.*"

Implied contracts within the foregoing definitions arose between the United States and the owners of the property destroyed by the inculpated cruisers when Great Britain paid the United States the value of the property so destroyed, provided there was, as in the case of *The United States vs. Russell*, 13 Wall., 630, an implied promise on the part of the defendant to pay to the claimant what in good conscience it is bound to pay; or that, on the receipt of the money, there arose a duty on behalf of the United States to pay this money to the persons who were entitled to it; or, in accordance with the views expressed in the case of *Knote vs. the United States*, 95 U. S. Rep., 156, the United States received the money charged with the duty to pay it over; or that the claimants had a lawful right to it when it was received by the United States.

Point II.

THE APPELLANT CLAIMS THAT THE CORRESPONDENCE AND COURSE OF DEALING WHICH TOOK PLACE BETWEEN THE GOVERNMENT OF THE UNITED STATES AND ITS CITIZENS, BY WHICH IT OBTAINED THEIR

CLAIMS FOR THE PURPOSE OF PRESENTING THEM TO AND COLLECTING THEM FROM GREAT BRITAIN; THE NEGOTIATIONS WHICH RESULTED IN THE TREATY OF WASHINGTON; THE CLAIMS, EVIDENCE AND ARGUMENTS PRESENTED TO THE TRIBUNAL BY THE UNITED STATES AND GREAT BRITIAN RESPECTIVELY; THE ACTS AND JUDGMENTS OF THE TRIBUNAL, AND THE OPINIONS OF ITS VARIOUS MEMBERS, ALL SHOW THAT THE MONEY WHICH WAS PAID TO THE UNITED STATES UNDER THE AWARD WAS PAID FOR CERTAIN SPECIFIC, DEFINITE AND WELL-ASCERTAINED LOSSES OF PRIVATE PARTIES, WHICH INCLUDED THOSE OF THE COLUMBIAN INSURANCE COMPANY, FOR WHICH GREAT BRITAIN HAD BEEN ADJUDGED TO MAKE INDEMNITY. THE FACTS WHICH SUPPORT THIS POSITION ARE SUMMARIZED IN THE FOLLOWING MEMORANDUMS—A, B AND C.

MEMORANDUM A.

A History of the Proceedings which Resulted in the Geneva Award.

Between September 4 and 11, 1862, the *Alabama* destroyed the *Ocmulgee* and several other whalers off the Azores. These depredations were reported by Mr. Dabney, United States Consul at Fayal, to Mr. Harvey, our Minister at Lisbon, who forwarded the papers to Mr. Seward, then Secretary of State, by whom they were sent to Mr. Adams, our Minister at St. James, with instructions—

> "To lay copies, or the substance thereof, before Earl Russell in such manner as shall seem best calculated to effect two important objects: first, due redress for the national and private injuries sustained; and secondly, a prevention of such lawless and injurious proceedings hereafter."
>
> (Claims of United States against Great Britain, Vol. III., p. 57.)

On November 20, 1862, Mr. Adams obeyed, in a dispatch full of able argument, fortified by controlling precedent, and concluding thus:

> "Armed by the authority of such a precedent, having done all in my power to apprise her Majesty's Government of the illegal enterprise in ample season for effecting its prevention, and being now enabled to show the injurious consequences to innocent parties relying upon the security of their commerce from any danger through British sources, ensuing from the omission of her Majesty's Government, however little designed to apply the proper prevention in due season; I have the honor to inform your lordship of the directions which I have

> received from my Government to solicit redress for the national and private injuries already thus sustained, as well as a more effective prevention of any repetition of such lawless and injurious proceedings in her Majesty's ports hereafter."
>
> (*Ibid*, pp. 70–73.)

On December 19, 1862, Earl Russell replied to Mr. Adams' note, going over the argument, and reaching the conclusion that—

> "Her Majesty's Government cannot, therefore, admit that they are under any obligation whatever to make compensation to United States citizens on account of the proceedings of that vessel."
>
> (*Ibid*, pp. 88–92.)

On December 20, 1862, Mr. Seward forwarded to Mr. Adams the memorials of the owners of the above-mentioned whalers for presentation to the British Government (*Ib.*, p. 87).

On January 5, 1863, Mr. Adams presented them as instructed (*Ib.*, p. 100).

On January 19, 1863, Mr. Seward approved Mr. Adams' presentation of the case to Earl Russell (*Ib.*, p. 113).

On January 31, 1863, the N. Y. Mutual Insurance Company presented to the Secretary of State of the United States (*Ibid*, p. 120), a memorial setting forth the destruction by the *Alabama* of the ship *Brilliant*, the payment by it of the amount of a policy on that ship, and claiming from the British Government a repayment to them of the amounnt so paid (*Ibid*, p. 118).

This memorial was transmitted to the American Minister at St. James for presentation to the British Government, was by him presented, and is believed to have been the second claim made upon Great Britain by any American citizen for damage caused by any Confederate cruiser.

As the war progressed other losses occurred, and claims therefor were preferred against Great Britain by the sufferers, both owners and insurers, through our State Department.

On Oct. 6, 1863 (*Ib.* pp. 176, 177), Mr. Seward, in a dispatch to Mr. Adams, wrote:

> "Upon these principles of law and these assumptions of fact the United States do insist and must continue to insist, that the British Government is justly responsible for the damages which the peaceful, law-abiding citizens of the United States sustain by the depredations of the *Alabama*."

claims for the purpose of presenting them to and collecting them from Great Britain; the negotiations which resulted in the treaty of Washington; the claims, evidence and arguments presented to the Tribunal by the United States and Great Britain respectively; the acts and judgments of the Tribunal, and the opinions of its various members, all show that the money which was paid to the United States under the award was paid for certain specific, definite and well-ascertained losses of private parties, which included those of the Columbian Insurance Company, for which Great Britain had been adjudged to make indemnity. The facts which support this position are summarized in the following memorandums—A, B and C.

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In 1865 our State Department issued a circular reading as follows:

> "Department of State,
> "Washington, Octr. 28, 1865.
>
> "The following official notice to claimants against foreign Governments was published on the 25th ult. by this Department:
>
> "Department of State,
> "Washington, Sept. 22, 1865.
>
> "Citizens of the United States having claims against foreign governments, not founded on contract, which may have originated since Feb. 8, 1853, will, without any delay which can be avoided, forward to this Department statements of the same, under oath, accompanied by the proper proof.
>
> * * * * * * * *
>
> "It is proper that the interposition of this Government with the foreign Government against which the claim is presented should be requested in express terms to avoid a possible objection to the jurisdiction of a future commission on the ground of the generality of the claim."

Additional claims for losses by the Confederate cruisers were filed in pursuance of this call.

On August 27, 1866, the claims theretofore filed with our State Department were summarized and forwarded to our minister at St. James, in a dispatch of that date, commencing:

> "You will herewith receive a summary of claims of citizens of the United States against Great Britain for damages which were suffered by them during the period of our late civil war, and some months thereafter, by means of depredations upon our commercial marine committed on the high seas by the *Sumter*, the *Alabama*, the *Florida*, the *Shenandoah* and other ships of war, which were built, manned, armed, equipped and fitted out in British ports."

(Claims of U. S. against Great Britain, vol. III. p. 632.)

The claims so presented consisted *only* of claims of owners, freighters or insurers of vessels or cargoes destroyed, and of sailors employed on such vessels.

(*Ibid*, vol. IV., p. 422.)

There matters rested for two years. Finally on November 10, 1868, the Johnson-Stanley convention was concluded, but was not satisfactory either to the President or Mr. Seward.

(*Ibid*, vol. III., p. 715.)

On January 14, 1869 (*Ib.*, p. 752) the Johnson-Clarendon convention was concluded, but was rejected by the Senate, presumably on the grounds taken by Mr. Sumner in his celebrated speech of April 13, 1869, viz. (*Ibid.*, Vol. 5, p. 719):

1. That it contained no apology for England's insult and injury to the United States.

2. That it made no provision for the adjustment of the national claim for damages.

3. That it recognized no rule of international duty applicable to such cases—or, to state it in his own words:

> "*England simply proposes to submit the question of liability for 'individual losses' to an anomalous tribunal, where chance plays its part. This is all. Nothing is admitted, even on this question; no rule for the future is established, while nothing is said of the indignity to the nation, nor of damages to the nation. On an earlier occasion it was otherwise.*"
>
> *Ibid.*, p. 725.

For the understanding of our counsel at Geneva on this point see their argument.

(Papers relating to the Treaty of Washington, Vol. III., p. 195.)

In his Message of December 5, 1870, President Grant proposed the appointment of a Commission

> "*to take proof of the amounts and ownership of these claims,*
> "*and that authority might be given for their settlement, so that*
> "*the Government might have the* OWNERSHIP *of the* PRIVATE
> " CLAIMS *as well as the responsible control of all demands against*
> "*Great Britain.*"
>
> *Ibid.*, p. 248.

On June 17th, 1871, the Treaty of Washington was ratified.

This treaty, while providing like the Johnson-Clarendon treaty for the private claims, met fully Mr. Sumner's objections to that convention:

1. By its expression of regret, *i. e.*, apology.

2. By providing for arbitration of the national as well as the private claims.

3. By the "three rules."

In September following the State Department issued a second circular, of which the following is a copy:—

"DEPARTMENT OF STATE,
"*Washington, September 1871.*

"*Sir—I have to acknowledge the receipt of your letter of the inst. and its enclosures. In reply, I enclose a copy of the Treaty concluded with Great Britain on the 8th of May last, and general instructions as to the proof of claims prepared for the use of claimants in the absence of rules by the tribunal which may pass upon the claims.*

"*In the absence of rules, and in anticipation of the action of the tribunal, this Department cannot assume to determine what claims it may or may not be proper to prefer under the first eleven articles of the treaty, nor to direct what form or extent of proof will be necessary to establish them, nor the effect of insurance upon the question of right of compensation. It will present to the Tribunal at Geneva, to be taken into account in estimating the sum to be paid to the United States, all claims growing out of the acts committed by the several vessels which have given rise to the claims generically known as the 'Alabama claims,' which may be presented to the Department in time to enable it to do so. Persons desiring to lodge claims in the Department for that purpose are requested to do so without delay, in such form, and such proofs as they may be advised or think proper to rest their claims upon, as the time for presenting the case of the United States expires on the 16th day of December next.*

"*I am, very respectfully, your obedient servant,*

"HAMILTON FISH,
"*Secretary.*"

Mr. J. C. Bancroft Davis was appointed by the President as agent of the United States before the tribunal provided for by the treaty (*Ib.*, Vol. 4, p. 3), and proceeded to prepare the "case" or bill of complaint of the United States upon the theory, as stated by himself, that England's haste in according belligerent rights to the Confederates and other like circumstances, together with the openly-expressed sympathy of individual members of the Government for the Confederates, should be set forth as evidence of an unfriendly feeling likely to affect their subordinates, and permissible to give color and interpretation to acts of officers in the British service, for which by themselves the Government might otherwise not be held responsible. In this case, after setting out at length the grounds on which the United States based its assertion of Britain's liability, in respect of each Confederate cruiser, he proceeded to classify the claims for which indemnity was demanded, as,

> "1. The claims for direct losses growing out of the destruction of vessels and their cargoes by the insurgent cruisers.
>
> "2. The national expenditure in pursuit of those cruisers.
>
> "3. The loss in the transfer of American commercial marine to the British flag.
>
> "4. The enhanced payments of insurance.
>
> "5. The prolongation of the war, and the addition of a large sum to the cost of the war and the suppression of the Rebellion."
>
> (Papers relating to the treaty of Washington, Vol. 1, p. 186).

The case then proceeded to set forth that—

> "The claims for direct losses growing out of the destruction of vessels and their cargoes may be sub-divided into—
>
> "1. Claims for destruction of vessels and property of the Government of the United States.
>
> "2. Claims for the destruction of vessels and property under the flag of the United States.
>
> "3. Claims for damages or injuries to persons growing out of the destruction of each class of vessels."
>
> "In the accompanying Vol. VII. the tribunal will find ample data for determining the amount of damage which should be awarded in consequence of the injuries inflicted by reason of the destruction of vessels or property, whether of the Government or private persons."

Thus it will be seen that the claims, as set forth in the "case," were comprised under two general heads, viz.:

A. Claims on behalf of the Government of the United States itself, to wit:

> "1. Claims for the destruction of vessels and property belonging to the Government.
>
> 2. The national expenditures in the pursuit of the cruisers.
>
> 3. The loss in the transfer of the American commercial marine to the British flag.
>
> 4. The prolongation of the war, and the addition of a large sum to the cost of the war and the suppression of the Rebellion.

B. Claims on behalf of individuals, viz.:

> 1. Claims for the destruction of vessels and property belonging to individuals.
> 2. Claims for damages or injuries to persons growing out of the destruction of vessels.
> 3. The enhanced payments of insurance or *war premiums.*

As to claims for injuries to persons, for the transfer of the American commercial marine to the British flag, and for the prolongation of the war, &c., the case states that no evidence was presented; the Arbitrators were left to estimate them (*Ib.*, p. 186).

As to the other claims the evidence was contained in Vol. VII. above mentioned. In this volume the evidence is divided into two general heads or classes, entitled respectively as follows, viz.:

> *First.* "Claims on behalf of the Government of the United States."

And under this head is, *first*, an official estimate of the value of a Government vessel destroyed, and *second*, an official list of

> "Expenses incurred by the United States in fitting out vessels to cruise for the *Alabama*, *Florida* and other cruisers."
>
> *Second.* "List of claims, filed with the Department of State, growing out of the acts committed by the several vessels, which have given rise to the claims generically known as the 'Alabama Claims.'"

As to this second subdivision the "case" says:

> "The statement shows the cruiser which did the injury, the vessel destroyed, the several claimants for the vessel and for cargo, the amounts insured upon each, and all the other facts necessary to enable the tribunal to reach a conclusion as to the amount of the injury committed by the cruiser. It also shows the nature and character of the proofs placed in the hands of the United States by the sufferers."
>
> "The United States present the amount, so far as it has come to their knowledge, of the enhanced payments of insurance caused by the acts of the insurgent cruisers." * * *
>
> "The amount of this injury, so far as yet known to the United States, appears in Vol. VII."

The counsel of the United States at Geneva understood and recognized this division of claims into "National" and "Private." So also did Mr. Davis, the "Agent."

The British counsel and agent also understood and recognized it.

(Papers relating to the Treaty of Washington, Vol. III., pp. 187, 190, 221, 249, 252. *Id.* Vol. 4, pp. 2, 4. *Id.* Vol. 2, p. 383.)

The "Case" and accompanying volumes of evidence were presented to the Tribunal at Geneva on Dec. 15, 1871, and on the 16th the Tribunal adjourned until the 15th of June following.

Before that time the British Government, becoming alarmed at the possible magnitude of the three classes of claims known as "the indirect claims," viz.:

1. The losses in the transfer of the American commercial marine to the British flag.

2. The enhanced payments of insurance.

3. The prolongation of the war, and the addition of a large sum to the cost of the war and the suppression of the rebellion,

—insisted that they were not within the scope of the treaty, and declined to proceed with the arbitration unless they were withdrawn The United States declined to withdraw them.

(*Ib.* Vol. II., p. 426.)

At this juncture the arbitrators, through Count Sclopis, stated that:

> "After the most careful perusal of all that has been urged on the part of the Government of the United States in respect of these claims they have arrived, individually and collectively, at the conclusion that these claims do not constitute, upon the principles of international law applicable to such cases, good foundation for an award of compensation or computation of damages between nations, and should, upon such principles, be wholly excluded from the consideration of the Tribunal in making its award, even if there were no disagreement between the two Governments as to the competency of the Tribunal to decide thereon."

(Papers relating to the Treaty of Washington. Vol. IV., p. 20.)

At the next meeting of the arbitrators, Mr. Bancroft Davis, agent of the United States, stated that this declaration of the arbitrators

> "Is accepted by the President of the United States as determinative of their judgment upon the important question of public law involved," and that he was authorized to say, that they " will not " be further insisted upon before the

> Tribunal by the United States, and may be excluded from all consideration in any award that may be made."
>
> *Ib.*, p. 21.

The agent of Great Britain assented to this method of settling the difficulty, and, thereupon, the arbitrators, at his request, entered upon the protocol of their proceedings that the said claims

> "Are, and from henceforth shall be, wholly excluded from the consideration of the Tribunal."
>
> *Ibid*, p. 22.

It is conceived that by this formal decision these three classes of claims were definitely rejected, finally disposed of, and that, without imputation of knavery upon the arbitrators, it cannot be fairly claimed that any portion of the sum awarded was in any manner on their account. Such was evidently the opinion of Mr. Bancroft Davis when, in making his final report of his doings to the Secretary of State, he said:

> "On the side of Great Britain the solution was a practical one—no damages were to be awarded for this class of claims. On our side the solution was reached in the manner pointed out by the treaty, viz.: By the action of the Court."
>
> *Ib.*, p. 6.

The whole proceeding resembles accurately a demurrer, with judgment for the defendant.

It may be argued that these claims were *waived* or *withdrawn*, but neither our Secretary of State, our counsel, or, as is evident, our agent, so understood the situation, and such was evidently not the fact.

(Papers relating to the Treaty of Washington, Vol. II., pp. 425, 582; Vol. III., p. 570.)

On August 27, 1872, the Tribunal having proceeded with the hearing of the case, decided to reject the claims for expenditure in pursuit of the cruisers, as comprised in the costs of the war.

Four of the five classes of claims set forth in the case were thus disposed of and definitely rejected. One class only remained to be considered, the first, which were:

"The claims for direct losses growing out of the destruction of vessels and their cargoes by the insurgent cruisers."

These claims arose out of the acts of eighteen cruisers, viz.: The *Alabama*, *Florida*, *Shenandoah*, *Tuscaloosa*, *Clarence*, *Tacony*, *Archer*, *Retribution*, *Georgia*, *Sumter*, *Nashville*, *Tallahassee*, *Chickamauga*, *Sallie*, *Jefferson Davis*, *Music*, *Boston* and *V. H. Joy*.

Article VII. of the treaty required the Tribunal to

> "determine as to each vessel separately, whether Great Britain has, by any act or omission, failed to fulfil any of the duties set forth in the foregoing three rules, or recognized by the principles of international law not inconsistent with such rules, and to certify such fact as to each of such vessels."
>
> (*Ib.*, Vol. I., p. 15.)

This the Tribunal then proceeded to do, and determined that Great Britain had so failed in the cases of the *Alabama*, of the *Florida*, and of the *Shenandoah* after her entry into Hobson's Bay, and that she was responsible for the acts of those vessels accordingly; and that as to the *Tuscaloosa* (tender to the *Alabama*), the *Clarence*, *Tacony* and *Archer* (tenders to the *Florida*), "such tenders or auxiliary vessels being properly regarded as accessories, must necessarily follow the lot of their principals, and be submitted to the same decision which applies to them respectively;" and that as to the other vessels, Great Britain was not in fault.

(*Ib.*, Vol. IV., p. 35.)

On August 19, 1872, at the session held on that day—

> "In compliance with the request of the Tribunal Mr. J. C. Bancroft Davis, as agent of the United States, and Lord Tenterden, as agent of Her Britannic Majesty, respectively presented to the Tribunal tables of figures relating to the losses for which compensation is claimed by the United States, with explanatory statements and observations."

In the preface to this table Mr. Davis says that

> "It shows the entire extent of all the private losses which the result to the adjudications of the Tribunal ought to enable the United States to make compensation for."
>
> Ib., Vol. III., p. 579.

At the time it was prepared the Tribunal had not reached a decision as to the *Shenandoah*, and the "table," which was simply a list of the vessels destroyed by the *Alabama*, *Florida* (and their tenders) and the *Shenandoah*, and the sum of the claims preferred in respect to each vessel and its cargo, enumerated six vessels destroyed by the *Shenandoah* before she reached Melbourne, the claims in respect of which aggregated $453,290.49. When the decision of the Tribunal had been reached Mr. Davis, in an explanatory note, corrected this by withdrawing claims to the extent of $453,290.49, for damages caused by the *Shenandoah* before she arrived at Melbourne.

According to this table the claims for which England was liable under the decision of the Tribunal aggregated $14,437,143.51, without interest. The British agent conceded these claims to amount fairly to $7,464,764, without interest. The Tribunal awarded the United States $15,500,000, including interest.

MEMORANDUM B.

THE SUM AWARDED BY THE TRIBUNAL AT GENEVA A MERE EQUIVALENT OF THE LOSSES OF SHIPS AND CARGOES DESTROYED, INCLUDING THE LOSSES OF MASTERS AND SEAMEN BY SUCH DESTRUCTION.

The question whether the Tribunal at Geneva did in fact admeasure the award upon and according to the private losses in the destruction of ships and cargoes by the *Alabama*, the *Florida* (and their tenders), and the *Shenandoah*, after she left Melbourne, and in the computation of the sum awarded ($15,500,000), did aggregate those private losses, including interest, at that sum, and exclude everything else, is answered by the following "STATEMENT," drawn from the documents of the Arbitration, which will remove all doubt on this point and show:

I. That the United States demanded from the Tribunal a sum in gross adequate for the satisfaction of these private losses, and to enable them to satisfy them thereout as completely as they would have been satisfied by the judgment of the Board of Assessors under the Xth Article of the Treaty, had that alternative for their ascertainment and computation been accepted.

II. That the British Government scrutinized and criticized the admeasurement of the private losses upon the same motives and in the same sense that it would have done before the Board of Assessors, in which it would have had an equal voice with the United States.

III. That the Tribunal executed the duty, between the two Governments, of applying its award exclusively to these private losses, and measuring them by the amount awarded.

IV. That the agent of the United States reported to his Government the efforts of the United States and their success, as having and securing the one object of an award of "such a sum as should be practically an indemnity to the sufferers."

If this be so, there is a perfect obligation on the part of the United States to administer the sum in gross, and divide it upon the same principles that the Board of Assessors would have made up their report of the amount necessary to be paid by Great Britain, viz., the aggregate of the authentic private claims.

STATEMENT.

The claims for private losses by the *Alabama*, *Florida* and *Shenandoah*, and their tenders, as presented with the case of the United States, were as follows (see Vol. 7, U. S. Claims, p. c. c. xliii. to vii.):

By the *Alabama*	$6,547,609 86
By the *Florida*	3,698,609 34
By the *Shenandoah*	6,488,320 31
	$16,734,539 51

The Committee appointed by the Board of Trade to examine and report upon these claims to the British Government had reduced them in their estimate as follows:

(Vol. 2, papers relating to Treaty of Washington, p. 386.)

By the *Alabama*	$3,288,851
By the *Florida*	2,635,568
By the *Shenandoah*	1,377,316
	$7,301,735

The above British estimate excluded all double claims; that is, in cases where owners and insurers had each made claims for the same property destroyed, the sum of these claims, so made, was reduced to what was thought to be the actual value of the property destroyed.

The above British estimate also excluded all claims for prospective catch or profits, and also all other claims supposed to be excessive and exaggerated.

Between the time of filing the case of the United States and the time of filing the counter-case of the United States, additional

claims had been sent to the Department of State, so that the sum of the claims as presented to the Tribunal by the United States, at the time of the presenting of the counter-case, was as follows, for all losses by the *Alabama*, *Florida*, *Shenandoah*, and their tenders:
(See Revised List of Claims, p. 355.)

By the *Alabama*	$7,050,293 76
By the *Florida* and tenders, the *Clarence* and *Tacony*	4,293,869 60
By the *Shenandoah*	6,656,838 81
	$18,001,002 17

The Committee appointed by the Board of Trade, applying the same rules as it had applied to the list of claims presented with the case of the United States, reduced the Revised List of Claims on the three vessels, as follows:
(See Papers Relating to Treaty of Washington, Vol. iii., p. 338.)

By the *Alabama*	$3,351,407
By the *Florida* and her tenders, the *Clarence* and *Tacony*	2,960,315
By the *Shenandoah*	1,338,436
	$7,650,158

With reference to the claims for private losses by the several cruisers, and in reply to the estimates of the Committee of the Board of Trade which had been put forward in behalf of the British Government, the Counsel of the United States, in their printed argument, said

> "The United States claim indemnity in like manner for vessels and other actual property of private citizens of the United States destroyed, and for immediate personal injuries to the officers and crews, caused by the Confederate cruisers, the responsibility of whose acts we have, as we think, already attached the British Government.
>
> "The nature of these reclamations is explained in the American case, and in the appendix thereto, especially in the seventh volume; and in supplementary documents there will be found detailed statements, made on oath, with valuations and other particulars for the information of the Tribunal.
>
> "The British Counter-case undertakes to control the facts thus set forth, and to do so by means of *estimates* made by British subjects at the request of the British Government.

"The Counsel of the United States respectfully submit that the claims of the United States in this behalf, vouched as they are, cannot be met by any such conjectural estimates as are put in by the British Government. The United States in those documents have exhibited the value of the property captured or destroyed as the primary element and lowest measure of damage and of consequent reparation.

"Justice, we conceive, and the universal practice of nations, demand thus much at least of indemnity for wrong."

Ib. vol. 3, pp. 215–216.

The counsel for Great Britain, on the other hand, in his argument, said:

"The estimates of losses, private and public, which have been laid before the Tribunal, are so loose and unsatisfactory, and so plainly excessive in amount, that they cannot be accepted as supplying even a *prima facia* basis of calculation."

Ib. p. 306.

The position of the counsel of the two Governments being so at variance, on the *19th of August, 1872*, "In compliance with a request of the Tribunal, Mr. J. C. Bancroft Davis, as Agent of the United States, and Lord Tenterden, as Agent of Her Britannic Majesty, respectively presented to the Tribunal tables of figures relating to the losses for which compensation is claimed by the United States; with explanatory statements and observations" (see Protocol xxiii).

Ib. vol. 4, p. 35.

At the *session of the 23d of August*, Lord Tenterden requested that the Tribunul would disallow the tables, as presented by Mr. Davis, in behalf of the United States, on the 19th of August (see Protocol xxv).

Ib. p. 36.

From the statement made by Lord Tenterden, it appears that he made the above request in part because the tables presented by Mr. Davis contained new and additional claims of the following description:

"1. (*a*) Claims for wages of crews of captured vessels from time of capture.

"(*b*) Claims for loss of personal effects of officers and crews.

* * * * * * * *

"2. Additional claims for shares of vessels not claimed for up to present time."

On the 23d of August "Count Sclopis, as President of the Tribunal, having read the Article VII. of the Treaty of Washington, asked the Tribunal whether, as to the *Sumter*, Great Britain has, by any act or omission, failed to fulfill any of the duties set forth in the three rules mentioned in article VI. of the Treaty, or recognized by the principles of international law, not inconsistent with such rules," and each member of the Tribunal answered the same.

On the same day Count Sclopis asked, and each member answered, a similar question as to all the several cruisers except the *Florida*.

On the 26th of August, 1872, Mr. Davis read a statement in reply the representation made at the former session by Lord Tenterden, which statement was in part as follows (see Protocol xxiv.):

Ib. p. 37.

(*Translation*):

"The agent of Her Britannic Majesty objects also.
"(A) In the matter of form.
"(B) In the matter of competence.

"We will reply *seriatim* to all these objections:

"I. As to the form, it is evident that the Arbitrators, in order to facilitate their investigation, have desired to have before them a comparative resumè of that which the United States claim, and of the criticism upon these claims, on the part of England—a criticism having reference as well to the sums as to the heads of these claims. These resumès, made by the two parties, in no way bind the arbitrators; they simply furnish information fitted to guide the Tribunal in the midst of the figures and details presented with the Cases and Counter-cases of the two Governments.

"The agent of Her Britannic Majesty pretends that the United States ought to base its resumé upon the model of the resumè of England, not only as to the form but also as to the matter. That is to say, if it pleases England to omit in its resumé a certain head of claim, the United States ought also to omit the same. That would be a strange synoptical table.

"Reason demands an explanation of the differences which exist between the figures of each head of claim, but it requires also an explanation of the differences which exist between even the heads of claims. Without that, England would only have to suppress, in its resumé, the head of the insurance claims, or that for freights, or that for any vessel you please, in order to withdraw that head of claims from the knowledge of the arbitrators. That would not be a method of instructing the Tribunal, but rather of deceiving it. Such an idea wears the air of pleasantry, and not at all of a serious objection to the table of the United States.

"The Tribunal will examine the resumés of the two governments. In each of these resumés the Tribunal will examine all the documents relating thereto, included in the cases and counter-cases of the two governments. It is the right, and it is the duty of each Government to submit to the Tribunal its respective proofs, without detraction on the one side, and without suppression on the other. Then the Tribunal will judge.

"II. As to the competence.

"(*a*) The treaty includes all the claims of the United States which have been designated under the generic name of 'Alabama Claims.'

"(*b*) The Tribunal, in its preliminary opinion, has limited the generality of these words, in excluding as claims, certain national losses, presented by the United States; but, in consequence of this opinion, the Tribunal is in possession of the question of all claims made by the United States in the interest of individual sufferers, and comprised under the generic name of 'Alabama Claims.' *The losses of officers, and, in general, of crews of captured vessels, are not less valid than those of the owners and insurers. On this point there can be no doubt.* * * *

"III. The United States make claim for all the undivided shares of a ship, whether the owner of the share, however small, makes claim or not, because *the United States will be obliged to indemnify all the owners, in case the Tribunal shall accord a gross sum to the United States.* If this were not done, there would be an evident injustice. The object of the treaty is to indemnify the United States for all the losses suffered by their citizens, and not to impose a part of that indemnification upon the United States themselves.

* * * * * * * *

"If the Arbitrators allow a sum in gross, that sum will necessarily be an estimate, in part, without which the result of the labor of the Tribunal would not be an actual indemnification to the United States.

"There are some secondary defects in the proofs of the United States; but there is an almost total want of definitive proof on the part of Great Britain.

"But if the Tribunal shall send these claims to the assessors, England will be bound, by the stipulations of the treaty, to pay to the United States the sum fixed by the assessors, without any limitation, whether of affirmative or of negative proofs. *Then the sailors who have not presented their claims, and even the owners, insurers or others, will have the right to make claims before the assessors.* Such is the evident meaning of the treaty."

Accompanying this last statement of Mr. Davis was another comparative table of claims for losses by the three vessels and their tenders, with a demand for interest at seven per cent. until the day of payment indicated by the terms of the treaty.

At this same session of the 26th of August, after deliberation, the Tribunal gave its decision as follows (see Protocol, xxv.):

> "The Tribunal does not see fit to order the withdrawal of the tables presented on the part of the United States, as requested by Lord Tenterden, but it declares that it considers these documents only as simple elucidation, such as were required by one of the arbitrators, Viscount d'Itajuba, to which the Tribunal will give such attention as is right."

At this same session the opinion of each member of the Tribunal was asked in regard to the *Florida* as it had been asked at the previous session in regard to each of the other cruisers.

At the session of the 29th of August "the Tribunal also decided to consider at the next conference the questions concerning the valuation of the destroyed vessels and the claims for interest" (see Protocol, xxvii.).

At the session of the 30th of August "the Tribunal having discussed in general the award of a gross sum, requested Mr. Staempfli, one of the arbitrators, to present for the next conference copies of a synoptical table," which he had prepared on the subject (see Protocol, xxviii.).

At the session of the 2d of September, the Tribunal by a majority of four to one, decided that interest should be admitted as an element in the calculation of a sum in gross (see Protocol, xxix.).

At the same session, Mr. Staempfli, as one of the arbitrators, presented to the Tribunal copies of the synoptical table which he had prepared as a proposition for the determination of a sum in gross, which table was as follows (see Protocol, xxix.):

“ *Estimate of Mr. Staempfli for the determination of a sum in gross.*

*	After the last American Table.	British Allowance.	Mean.
“Amount of claims	$14,437,000	$7,074,000	$10,905,000
“ Expenditure in pursuit	6,735,000	940,000	Struck out.
“Prospective profits and interruption of voyage	4,009,100	Struck out as such, but for wages....	588,000
		25 per cent on the values of vessels....	400,000
			$11,893,000

“ Round sum		$12,000,000
“ Interest from the 1st January, 1864, to the 15th September, 1872.		
“ 1. At 5 per cent. during eight years and eight and one-half months.		
8x$600,000=	$4,800,000	
8½x 50,000=	425,000	
		5,225,000
		$17,225,000
“ Eventually one year's interest more		$17,825,000
“ 2. At 6 per cent. during eight years and eight and one-half months.		
8x$720,000=	$5,760,000	
8½x 60,000=	510,000	
	$6,270,000	$18,270,000
“ Eventually one year's interest more		$18,990,000
“ 3. At 7 per cent. during eight years and eight and one-half months.		
8x$840,000=	$6,720,000	
8½x 70,000=	595,000	
	$7,315,000	$19,315,000
“ Eventually one year's interest more		840,000
		$20,155,000
“ Round sum		$20,000,000

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* These tables referred only to the three cruisers.

At the same session, Sir Alexander Cockburn, as one of the Arbitrators, presented a memorandum criticizing the estimate of Mr. Staempfli, and he also presented his own estimate or table, as follows:

“*Table in reference to the estimate of Mr. Staempfli.*

“Total United States claim in the last revised tables		$14,437,143
“Necessary reduction to be made from the above supposed total:		
“Double claims	$1,682,243	
“New claims	1,450,000	
“One-half gross freight	503,576	
		3,635,819
“Making the total reduced claim		$10,801,324
“As against the British estimate of		$7,464,764
“The mean of these two sums is		$9,133,044
“Add to this Mr. Staempfli's allowance in lieu of prospective catch:		
“One year's wages	588,000	
“Twenty-five per cent. on the value of vessels	400,000	
		988,000
		$10,121,044

At the same session “after a detailed deliberation, a majority of the Tribunal of four to one, decided under the VIIth Article of the Treaty of Washington, to award in gross the sum of $15,500,000, to be paid in gold by Great Britain to the United States, in the time and manner provided by the said Article of the Treaty of Washington” (see Protocol, xxix.)

It being remembered, as shown by the Protocols, that the Tribunal, in answer to the questions as proposed by Count Sclopis to each of the several owners, had previously decided that Great Britain was responsible only for the acts of the *Alabama* and *Florida*, with their tenders, and for the acts of the *Shenandoah* after she left Melbourne, and that the Tribunal had already rejected all so-called indirect claims, all claims of the United States for the pursuit of the cruisers, all claims for prospective earnings, all claims for gross freights, and had decided to allow only one claim for the same loss, thus rejecting all double claims; the memorandum above given establishes the following facts:

First. At the session of the 2d of September, the Agent of the United States claimed $14,437,143.51, with interest thereon, at seven per cent., as the gross sum that should be awarded.

Second. At the same session, the Agent of Great Britain claimed that $7,464,764 was the proper sum that should be awarded, together with such additional sum as the Tribunal should give by way of interest.

Third. At the same session, Mr. Staempfli, one of the Arbitrators, thought that $12,000,000, with interest, was the proper mean gross sum which the Tribunal ought to allow.

Fourth. At the same session, Sir Alexander Cockburn, the Arbitrator appointed by Great Britain, presented $10,121,044 as the mean sum between the claims presented by the United States, after certain deductions had been made, and the British estimate of the same claims.

Fifth. At the same session, after a "*detailed deliberation*," with a knowledge of the facts before stated, four of the five members of the Tribunal decided to award, in gross, the sum of $15,500,000, to be paid in gold, by Great Britain, to the United States.

Mr. Davis, in his dispatch to Mr. Fish, dated Paris, 21st of September, 1872, giving a report of his action, as agent of the United States, says:

> "The neutral arbitrators and Mr. Adams, from the beginning of the proceedings, were convinced of the policy of awarding a sum in gross.
>
> "For some weeks before the decision was given, I felt sure that the arbitrators would not consent to send the case to assessors until they should have exhausted all efforts to agree themselves upon the sum to be paid.
>
> "*We therefore devoted our energies toward securing such a sum as should be practically an indemnity to the sufferers. Whether we have or have not been successful can be determined only by the final division of the sum.*"
>
> *Ib.*, Vol. IV., p. 8.

MEMORANDUM C.

SELECTIONS FROM THE OPINION OF CHIEF JUSTICE COCKBURN, FILED ON THE SAME DAY AS THE FINAL AWARD.

Showing that the gross sum to be awarded by the Tribunal was, in his opinion, "the best estimate it was enabled to arrive at on the data before it of the losses actually sustained by American citizens through the three ships for which Great Britain is to be held liable." That this sum included : *First*, the value of the vessels destroyed, with certain allowance for net freight. *Second*, the value of cargoes. *Third*, the value of personal effects. *Fourth*, interest at six per cent. until the date of the award.

Sir Alexander Cockburn, who declined to assent to the decision of the Tribunal, stated the grounds of his own decision, which the Tribunal ordered to be recorded as an annex to the last protocol, namely, XXXII., which is of the date 14th of September, 1872. This opinion is printed in the fourth volume of the papers relating to the Treaty at Washington, and beginning with page 536, is particularly instructive in showing how the final award of fifteen millions and a half was arrived at by the several arbitrators.

The following extracts are quoted from the same opinion, except that the italics are not in the original :

> "The Tribunal having thus settled the instances in which it is prepared to hold Great Britain responsible, we have next to consider the important question of damages.
>
> "The first question which presents itself on approaching the subject of *pecuniary compensation is whether the tribunal ought to award a sum in gross or whether it would be advisable to refer the amount of compensation, to be settled by assessors, under the provisions of the treaty of Washington.*
>
> "On the one hand, as it is admitted that these claims have never been audited or even been *bona fide* examined by the government of the United States, it must necessarily be extremely difficult to estimate the amount which should be awarded in respect of them, more especially as it becomes apparent that a large proportion of them are most extravagant in amount, while none of the ordinary documents evidencing the value of shipping property or merchandise have been brought before the Tribunal. On the other hand, it is for many reasons desirable that the matters in dispute should be disposed of and settled as soon as possible, so as to put an end to all further disputes, as well as to avoid giving the opportunity which would be offered by sending the settlement to assessors to invent fresh claims and present them from day to day before the latter. *On the whole, I have come to the conclusion that if the clearly inadmissible claims be rejected, and the extravagant claims properly reduced, justice may substantially be done by awarding a lump sum, and that the advantages of such a course would counterbalance the disadvantages which it no doubt involves.*
>
> "The claims for individual losses, which were in April last advanced in the revised statement, amounted to $25,547,161, besides which a claim for costs of pursuit and capture, exceeding $7,000,000,

was preferred on the part of the United States Government. To all which was superadded a claim for interest of seven per cent. per annum from the time of capture until payment. *These claims have, however, to be diminished by reason of Great Britain having been pronounced by the Tribunal to be liable in respect only for the captures made by the Alabama, Florida and Shenandoah, and for those made by the latter only after her departure from Melbourne. On the other hand, the claims in respect of the other vessels having been rejected,* the representatives of the United States, on the 19th of August last, presented new and increased claims to the entent of $2,150,000, so that *the claims then advanced by the United States in respect of those captures, for which Great Britain has been held liable*, amounted, after correcting certain admitted errors of calculation, to $19,146,444, over and above a claim of $6,705,062, for the cost of pursuit and capture *in respect of the three vessels*, and the claim of interest at the rate of seven per cent.

"I concur entirely with the rest of the Tribunal in holding that the claim for cost of pursuit and capture must be rejected.

"This item of expense formed part of the general expense of the war. The cruisers employed on this service would, probably, have been kept in commission had the *three vessels in question* never left the British shores.

"*We have, therefore, only to deal with the claim for losses sustained by individual citizens.*

"Now, there can be no doubt that the only damages which the Tribunal is authorized to award, under the Treaty, for the indemnification of American citizens, must be confined to loss actually sustained *by destruction of ships, cargoes or personal effects*, where damage to property arises, not directly from wilful injury, but indirectly only, from want of due care, an indemnity against actual loss is all that, by the law of England or America, or by any principles of general jurisprudence, can possibly be awarded.

"If, therefore, this Tribunal, instead of sending the amount to be paid by Great Britain to be ascertained by assessors, should think fit to award a sum in gross, as it is empowered to do by the Treaty, *it must still, in fixing the latter, proceed on the best estimate it may be enabled to arrive at, on the data before it, of the losses actually sustained by American citizens through the three ships for which Great Britain is to be held liable.*

"The claims for individual losses by reason of property destroyed *by the three ships in question*, amounts to the sum of $19,146,444; but this amount includes items which involve important questions of principle, and deserve special consideration."

These are:

* * * * * * *

* * * *(c)* "As to the double claims. They consist in the main of the claims made by the owners for the value of their property simultaneously with claims advanced by the insurance companies with whom the property was insured, and who paid the

owners the amount of their loss. To pay the owners and the insurance companies these double claims would be clearly equivalent to paying the losses twice over. One of these claims, therefore, must necessarily be rejected."

"I now proceed to consider the questions relating to *the value of the property actually destroyed*. It is admittted in the argument of the United Sattes government that these claims had never been audited by that government. I cannot help thinking it would have been better if, before the United States called upon this Tribunal to estimate the value of claims to be assessed by it without an inspection of the documents which are said to be filed at Washington, these claims had been audited under the authority of the United States Government. Had this been done I think it is only fair to assume that the very numerous demands which are manifestly extravagant would have been diminished in amount in the same manner as the claims in respect of the vessels sunk in the river Seine (more than once referred to in the British reports) were reduced after they had been thoroughly sifted by Her Majesty's government. The Tribunal is, in fact, called upon to estimate the values of vessels the age and class of which are not given, and the values of cargoes of which neither the description nor quantity is stated. Under these circumstances it is manifest from the experience every day gained in courts of justice, that a very considerable deduction ought to be made from the estimates presented by the claimants in respect of the losses for which they are claiming compensation.

To hold Great Britain simply liable for the amounts demanded by the claimants would not be to award the latter fair compensation, but to grant them enormous profits.

"I now proceed to consider the values of the vessels."

* * * * * *

"I now come to the claims of cargo."

* * * * * *

"The last item of claims to be considered is that relating to personal effects."

* * * * * *

"On the whole, therefore, I am of opinion that if half a million dollars should be added to the British estimate, more than adequate compensation will, in all probability, be granted for any direct losses which may have been occasioned by the Confederate cruisers, and that therefore, the tribunal ought to assess these claims at an amount not greater than eight million dollars.

"In the observations of M. Staempfli's calculations, which I submitted to the other members of the Tribunal on the second of September and which will be found in the protocol of that date, I have shown that even including the allowances of nine hundred and ninety-eight thousand dollars for profits and wages of whalers and the allowance of fifty per cent. on the claims for freight, and striking a mean between the British estimate and *the gross claims for the other items not absolutely disallowed by the Tribunal*, the amount should not exceed $10,000,000 in round numbers.

"The Tribunal having formed *its estimate of the actual loss sustained in respect of ships and property at the time of their destruction*, a most important question presents itself, whether, to *such actual value*, interest from the time of loss should be superadded."

* * * * * * * *

"At all events, I see no reason why, under all these circumstances, anything more than the lowest rate of interest anywhere prevailing in the United States should be allowed; and I cannot concur in the rate of six per cent. adopted by the Tribunal. I have now traveled through the wide range of this inquiry, partly in order to place the facts over which a cloud of prejudice has been raised in their true light; partly to explain the reasons which prevent my concurring in the award which the majority of the Tribunal have thought it right to pronounce.

"The result is, that while I differ from the grounds on which the decision of the Tribunal in the case of the *Alabama* is founded, nevertheless, owing to the special circumstances to which I have hereinbefore called attention, I concur in holding Great Britain liable in respect of that ship.

"With respect to the *Florida*, on the best judgment I can form upon a review of all the facts, the charge of want of due diligence is not made out.

* * * * * * * *

"As to the *Shenandoah* I cannot express too strongly my dissent from the decision of the majority. Not concurring in the decision as to the *Florida* and *Shenandoah*, *I cannot, of course, concur in awarding the sum which is to be paid on account of the damage done by them.*

"Even if this were otherwise, I should still hold the amount awarded greater than it should have been.

"Lastly, under the very special circumstances out of which these claims have arisen, it appears to me that the allowance of interest was uncalled for and unjust."

* * * * * * * *

"A. E. COCKBURN.

"Geneva, September 14, 1872."

Point III.

THE AWARD WHICH WAS PAID AS AN INDEMNITY FOR LOSSES OF PRIVATE PARTIES EMBRACED THE CLAIMS OF THE UNDERWRITERS AND OF THIS APPELLANT.

In the circular letter of September 22, 1865, issued by the Secretary of State, he asks that our claims be filed with the Department. In the circular letter of the Secretary of September, 1871, he asks for proofs of the claims. In the statement made by the Department of State of the claims filed the Government say :

> "The following is an Abstract of the claims filed in the Department of State by American citizens, native and naturalized, for damages sustained by them as owners, mariners, freighters or insurers of duly documented American ships captured or destroyed or appropriated by the officers and crew of the steamer *Alabama*, and as owners, insurers or otherwise interested in the cargoes of such ships, or in charter parties for the service of such ships."
>
> (Vol. 4 Claims of the United States against Great Britain, p. 422.)

At the request of the arbitrators the agent of the United States Government presented to the Tribunal a detailed list of losses, and stated :

> "The claims presented by the United States are supported by sworn statements presented by those who possess the necessary information, and they exhibit in detail the items which go to form the sum total, and the names of all who have made reclamation, whatever may be the sum the Tribunal may see fit to award. The claims on the part of private individuals thus computed, verified and submitted, are supported by all the guarantees of their good faith and their validity, as well for their general amount as for the facts concerning them, which governments are in the habit of requiring in such cases from their own citizens."
>
> (Papers relating to the Treaty of Washington, Vol. 3, p. 579.

The counsel for Great Britain in their counter case recognized the presence of the underwriter's claims.

Ib., Vol. 2, p. 385.

A moment's inspection of the papers presented at Geneva of the losses and owners and insurers, and a comparison of the same with the petition in this case, will show that the appellant's claims went before the Tribunal. The papers specifying these claims were in their nature most definite and exact. They brought before the Tribunal the exact damages that had accrued; the names of the sufferers, and the particular property that had been destroyed. It defined the limit within which Great Britain was responsible for losses; and having settled this question the question was, should the Tribunal adjourn after having laid down this rule of law and the limits of its application, and leave the amount which was to be given to each person to be computed by a board of assessors, or should it go forward and assess the damages in a lump sum. The United States Government had asked them to take the latter course, because the injuries the United States complained of were committed many years since, and had been increased by the delay in making reparation (*Ib.*, vol. 1, p. 189). By the terms of the treaty the Tribunal had the power to constitute itself a Board of Assessors. They had the power to assess the damages in each particular case. They had the power to compute the entire damages and award them in a lump sum, which was done. This lump sum was made up from the aggregates of the eighty-nine vessels destroyed, and from no other source whatever, and from the simple fact that all other grounds of damage had been excluded. It would make no difference in the present case whether the names of the insurers and the amounts which they claimed had gone to Geneva or not. Great Britain was adjudged to pay for certain vessels and cargoes, and for nothing else. It was no matter who owned them. After the United States received the indemnity for this definite property it had but two duties, one to find out the honest measure of value of each piece of property, and secondly, who was the owner of each piece; and, it made no difference whether they were the original sufferers or whether they were insurance companies who had paid the sufferers, and by such payment had become the ultimate sufferers.

After the money arrived in this country the Act of 1874 (18 Stat. at Large, 245) called upon uninsured owners to come forward and present their claims. They did so, and were paid, and no others received payment except in a few cases where an insurance company did show a loss in its business. Thus the claims of the uninsured owners on this fund were eliminated and it left nothing but the indemnity paid for the claims of the insurers who had paid losses to the various assured. These losses were in their nature most definite and certain; and there was nothing left for chance, estimate or guess. They were in every case, without exception, losses paid under certain policies, the exact amount of which was stated in the policy. The extent of the claims of the uninsured owners, when proved, depended to a very great extent upon what was the value of this or that vessel, her seaworthiness and equipment, and a thousand things necessary to form an estimate, but in the case of the underwriters no such rule can obtain. Consequently the fund now stands, with all the elements of uncertainty eliminated, all the elements of estimate, computation or even guess wiped out. There can be but one deduction—that the money that was left belongs to the underwriters and their claims can be distinctly traced as they are the most definite and certain of all the claims presented, and because everything has been taken from the fund except the money paid for these definite and certain claims.

Point IV.

THE UNDERWRITERS HAVE A VALID CLAIM TO A PORTION OF THE FUND PAID BY GREAT BRITAIN AS AN INDEMNITY FOR THE LOSSES OF INDIVIDUALS.

The property which the three cruisers destroyed, and for which Great Britain paid the indemnity, was the property of individuals, partnership firms or corporations. Many of these owners had insured the whole or part of their property so destroyed with various Insurance Companies in the United States and elsewhere. Upon the destruction of the property, the abandonment by the assured, and the payment by the underwriter of the amount of insurance, he became subrogated *pro tanto* to the rights of the assured. These rights being property passed to the insurers of the property destroyed; the law gives to the act of abandonment when accepted all the effects which the most accurately drawn assignment could accomplish. The underwriter then stands in the place of the insured, and becomes legally entitled to all that can be rescued from destruction. This doctrine is too well settled to be discussed or disturbed.

> *Comegys vs. Vasse*, 1 Peters, 215.
> *Rhinelander vs. Ins. Co. of Pa.*, 4 Cranch, U. S. Rep., 29.
> *Symonds vs. Union Ins. Co.*, 4 Dallas, 417.
> *Rogers vs. Hosack's Exors.*, 18 Wend., 318.

The counsel for the British Government at Geneva recognized this doctrine most clearly. They say:

> "The American insurance companies who have paid the owners as for a total loss are, in our opinion, entitled to be subrogated to the rights of the latter, according to the well-known principle that an underwriter who has paid as for a total loss, acquires the rights of the assured in respect of the subject matter of insurance. This principle was explained and acted upon in the well-known English cases of *Randall vs. Cochran*, (1 Vesey Sr., 98) and the *Quebec Fire Ins. Co. vs. St. Louis*, (7 Moore, P. C., 286) and is well recognized by the Courts of America."
>
> Vol. 2, Papers relating to Treaty of Washington, p. 385.

Daniel Webster, in his speech in the United States Senate on the subject of the French Revolution claims, says:

> "As to the portion of the claims now owned by underwriters they stand on the same equity and justice as if possessed and presented by the owners of the ships and goods. There is no more universal maxim of law and justice throughout the civilized and commercial world than that an underwriter who has paid a loss on ship or merchandise to the owner is entitled to whatever may be received from the property. His right accrues by the very act of payment, and if the property or its proceeds be afterward recovered in whole or in part, whether the recovery be from the sea, from captors, or from the justice of foreign States, such recovery is for the benefit of the underwriter. An attempt, therefore, to prejudice these claims on the ground that many of them belong to insurance companies or other underwriters is at war with the first principles of justice." (Webster's Works, Vol. 4, p. 156.)

The Attorney-General Hoar, in the case of the *steamboat Robert Campbell, Jr.* (p. 182, Vol. 13, of Opinions of Attorneys-General), an insured vessel which was impressed by the United States into the military service, and lost, the question of the right of the insurance companies which had paid the loss was presented to him, and he says:

> "The principles upon which the following cases were decided by the Supreme Court establish, I think, the right of the insurance companies to receive from the United States, in the place of the owners who were insured, whatever amount of money, less than the value of the steamers and now remaining unpaid, those companies have paid the owners under their policies, and which the owners would otherwise be entitled to receive;" citing *Comegys vs. Vasse*, 1 Peters, 195; *Carpenter vs. Providence Washington Ins. Co.*, 16 Peters, 495, and *Gallison vs. The Memphis Ins. Co.*, 19 How., 312.

This Court held in *Hall & Long vs. Railroad Companies*, 13 Wall., 367, that

> "The insurer stands practically in the position of a surety; he is entitled to all the means of indemnity which the satisfied owner held against the party primarily liable. Hence it has often been held that an insurer who has paid a loss may use the name of the assured in an action to obtain redress. * * * It is conceded that this doctrine prevails in cases of marine insurance."

Point V.

THE CLAIMS OF THE INDIVIDUALS UPON GREAT BRITAIN FOR THE VESSELS AND CARGOES DESTROYED BY THE INCULPATED CRUISERS ARE PROPERTY.

The earliest case in this country on this question is that of *Comegys vs. Vasse*, tried before the U. S. Circuit Court at Philadelphia (4 Wash. R., 576). The Court there held that the claim of our citizens against Spain for indemnity for vessels improperly taken was simply an expectancy, without hope, because it was without right, even a contingent one, and was without contract or obligation to support it, and without remedy in any known event to enforce it, and it depended upon the mere pleasure of an independent Government, which acknowledged no law but its own will, and which sets at defiance all remedy but that of force; and that when Spain made restitution under the treaty the money was not *damages* for the illegal captures, because the claims could not be enforced in the ordinary tribunals of either Spain or the United States, and that the discharge of the claims was simply a *donation* bestowed upon the individual by a voluntary act of sovereign power.

The above views were expressly overruled when the case came up on appeal in this court (1 Peters, 195).

Mr. Justice STORY, writing the opinion, says:

> "The right of indemnity for an unjust capture, whether against the captors or the sovereign, whether remediable in his own courts or by his own extraordinary interposition and grants upon private petitions or upon public negotiation, is a right attached to the ownership of the property itself, and passes by cession to the ultimate sufferer (p. 215). It is not universally, though it may be ordinarily one test of right, that it may be enforced in a court of justice. Neither the King of Great Britain nor the Government of the United States is suable in the ordinary courts of justice for debts due by either. Yet who will doubt that such debts are rights? It does not follow that because an unjust sentence is irreversible, that the party has lost all right to justice or all claim, upon principles of law, to remuneration. With reference to mere municipal law he may be without remedy, but with reference to principles of international law he has a right both to the justice of his own and the foreign sovereign.
>
> "The theory, too, that an indemnification for unjust captures is to be deemed, if not a mere deviation, as in the nature of a donation, as contrasted with right, is not admissible.
>
> "It (the treaty) with Spain recognized an existing right to compensation in the aggrieved parties, and did not in the most remote degree turn upon the notion of a *donation* or *gratuity*. It was demanded by our Government as matter of right, and as such was granted by Spain."

In *Erwin vs. The United States* (7 Otto, 392), this court affirmed the doctrine that the claim of a party against the Government for goods taken, although it cannot be enforced by suit, is a part of his personal estate. Justice FIELD says:

> "Demands against the Government, if based upon considerations which would be valid between individuals, such as services rendered or goods taken, are property, although there be no Court to investigate and pass upon their validity."

And cites the above case of *Comegys vs. Vasse.*

The same doctrine is again affirmed in *Phelps vs. McDonald* (9 Otto, 298).

McDonald, a British subject resident in this country, was on his petition declared a bankrupt on December 10, 1868. His estate was in the ordinary form conveyed to an assignee in bankruptcy on February 12, 1869, and his final discharge was granted on March 17 of the same year. The military forces of the United States during the early part of 1865 had burned some of his cotton in Louisiana and Arkansas.

The Treaty of Washington, which made provision in regard to such claims of British subjects, was not signed until May 8th, 1871, more than two years after his assignment had been made to his assignee. The Court held that his right of indemnity accrued when the cotton was burned, and although at the time the bankrupt made his assignment it was not enforceable, still it was a right attached to the ownership of the property. It was a right to the justice of the United States, and as such right it traveled (as Justice STORY says) with the right of property, and was an appendage of the right of property, and as such it passed to McDonald's assignee as property.

The same reasoning applies to the appellant's claim under the Geneva award. At the time of the burning of the ships and cargoes which it insured, the right to an indemnity accrued, which has passed by cession to the ultimate sufferers. Whether the indemnity would be received sooner or later, or whether the means of enforcement existed at that time or not, did in no way affect the existence of the right of indemnity which is the property of the appellant, who stands in precisely the same position as that occupied by McDonald's assignee.

Point VI.

THE MONEY PAID UNDER THE AWARD WAS NOT THE PROPERTY OF THE UNITED STATES IN ITS OWN RIGHT.

The claims which it presented to the Tribunal on behalf of itself, so far as they related to the national expenditure in pursuit of the cruisers, the loss in the transfer of the commercial marine to the British flag, the prolongation of the war and the addition of a large sum to the cost of the war and the suppression of the rebellion, were by the judgment of the Tribunal excluded from its consideration (Papers relating to the treaty of Washington, Vol. 4, pp. 20, 21).

They were properly excluded, because in their negotiations prior to the treaty, and in the treaty itself the United States had undertaken to treat with Great Britain, and call her to account not as an enemy, but as a friend who had abused our friendship and violated the rules of neutrality, and by such violation injuries had arisen both to the Government and to private individuals.

If the claims of the Government in its own right were to be enforced, it should have been done by war, and treating her as an enemy and an ally of the confederacy, and not as a friend through whose mistakes and negligence the loss occurred.

The original insertion of these claims was for the purpose of obtaining an adjudication, which should determine for the future, one way or the other, whether the claims were such that they did or did not constitute a possible ground of reclamation from a neutral power drawn into an act of violation of its neutrality.

Letter of Mr. Davis, to the Secretary of State (Vol. 4 of papers relating to the treaty of Washington, p. 6), and the letter of the Secretary of State in reply criticising the opinion of Lord Cockburn, the British arbitrator. *Ib.*, Vol. 4, p. 545–6.

The circular letter of the Department of State, under date of October 28, 1865, called upon citizens of the United States having claims against foreign countries, not founded on contract, which may have originated since the 8th of February, 1853, without any delay which could be avoided, to forward to the Department statements of the same, under oath, accompanied by the proper proof. It also stated—

> "*That the interposition of this Government with the foreign Government against which the claim is presented should be requested in express terms* to avoid a possible objection to the jurisdiction of a future commission on the ground of the generality of the claim."

The message of President Grant in December, 1870, recommended the appointment of a commission to take proof of the amounts and ownership of these claims, and that authority might be given for their settlement, so that the Government might have *the ownership of the private claims* as well as the responsible control of all demands against Great Britain.

In the circular letter issued by the State Department in September, 1871, after the Treaty of Washington had been signed, it was stated—

> "That in the absence of rules, and in anticipation of the action of the Tribunal this Department cannot assume to determine what claims it may or may not be proper to prefer under the first eleven articles of the treaty, nor to direct what form or extent of proof will be necessary to establish them, nor the effect of insurance upon the question of right of compensation. It will present to the Tribunal at Geneva, to be taken into account, in estimating the sum to be paid to the United States, all claims growing out of the acts committed by the several vessels which have given rise to the claims generically known as the Alabama Claims."

In these circular letters and message there is not an intimation that the Government owned these claims, but direct proof to the contrary. The elimination at Geneva of the claims of the United States Government, as such, and of the enhanced premiums for insurance, otherwise known as "war premiums," left only the private claims for direct losses for consideration. They were simply a bundle of private claims—owners, claimants, ships, cargoes, all named; all measured dollar by dollar. The insurers were named in every case for the amounts for which they were claimants, and the private losses were the only claims submitted to the Tribunal for its adjudication, scrutiny ascertainment, and computation, excepting the losses and estimate furnished by the Navy Department of the other direct claim—the cost of the ineffectual naval cruises to intercept the cruisers—and they were thrown out because they could not be separated from the actual expenses of the war which had been theretofore covered by their judgment.

It is true that the seventh article of the treaty provides that

> "In case the Tribunal find that Great Britain has failed to fulfil any duty or duties as aforesaid, it may, if it think proper, proceed to award a sum in gross to be paid by Great Britain to the United States for all the claims referred to it."

The Tribunal, making use of the authority conferred upon it by said article, by a majority of four voices to one awarded to the United States a sum of $15,500,000 in gold, as the indemnity to be paid by Great Britain to the United States for the satisfaction of all the claims referred to the consideration of the Tribunal, conformably to the provisions contained in that article.

The idea cannot for a moment be entertained that this article of the treaty and this wording of the award wrested from our citizens the indemnity which was paid for their property and vested the title thereof in the United States, free and clear of any right or duty on the part of the United States to pay it over to the claimants.

It was perfectly competent for the Tribunal, after it had decided that Great Britain should make indemnity for the acts of only three cruisers, to have then adjourned. The Board of Assessors then could have been appointed under the Treaty, who would have computed the damages within the limits marked out by the Tribunal, and these damages, which would have been awarded to each person and individual, would have been his private property; and the fact that, for reasons which were controlling upon the Tribunal and also upon the counsel for Great Britain and the United States, they did not adjourn, but went forward and acted as a board of assessors, and computed the damages within the limits which they had laid down, and directed that England should pay a gross sum for such damages, cannot affect the rights of the claimants thereto.

If this money has become the property of the Government then by this alternative form of proceeding there is taken from the claimants and given to the Government all their rights of indemnity which they claim to be property. Then this change has been accomplished, not by consent nor by consultation with the claimants, but by the action as a Government of the authority to which they had committed their claims, and which Government had assumed to deal with, and which it had dealt with, as a Government publicly. By this course the Government has wrested from every claimant every right which he had to this property, and that, too, without compensation and without procedure in accordance with the law. That such a result did take place by this alternative act is legally impossible, while if it did not take place then the Government did not receive the money as the absolute owner thereof, but received it as the money of the sufferers by these depredations.

That the Government did not consider itself the owner of this money is shown by the Act of March 3, 1873 (17 Statutes at Large, p. 601), where immediately upon payment of the money the Statute provides: "And the amount equal to the debt so redeemed shall be invested in the five per cent. registered bonds of the United States, to be held subject to the future disposition of Congress."

The same idea pervades the Act of 1874, which put into operation the first Court of Commissioners on the Alabama claims (18 Statutes at Large, 245) where in the title it is stated that the act is "An act for the creation of a court for the adjudication and disposition of certain moneys received into the Treasury under an award made by the tribunal of arbitration constituted by virtue of the treaty of Washington."

From the foregoing the following propositions may be legitimately derived:

I. The fund is provided under the negotiations of the two Governments, and the arbitration which they produced, as an indemnity from Great Britain in full satisfaction of the injuries inflicted by the "acts of the rebel cruisers," for which Great Britain, on the principles of public law, should be held responsible.

II. The responsibilities of Great Britain were held not to include any other injuries than the destruction of vessels and property on board them, by the Alabama, the Florida and the Shenandoah after she left Melbourne, for which she was adjudged to make indemnity.

III. The computation of the injuries excludes "prospective catch," in the case of the whalers, and prospective profits, or consequential losses in commercial voyages; allows only net freights, and includes interest on the losses (probably at six per cent.), from their occurrence until the date of the award.

IV. If an assessment of individual claims had been awarded by the Tribunal, under the Tenth Article of the Treaty, to ascertain the amount to be paid by Great Britain, these would have been required by the Tribunal to conform, in allowing or rejecting, and in measuring claims against Great Britain.

V. In adopting the alternative of awarding a sum in gross, as the Treaty permitted, and the United States desired, the Tribunal has simply remitted a fund, computed by it to be adequate, to the distribu-

tive administration of the United States, in satisfaction of the injuries for which Great Britain is held responsible by the Tribunal.

VI. The United States receives the fund, then, from Grent Britain, upon the trust that it shall be applied in satisfaction of the injuries for which Great Britain has been adjudged to make indemnity, and not otherwise.

VII. The only duty, and the only discretion entrusted to the United States, in the distribution of this fund, was the ascertainment (1) of the honest measure of the losses of ships and cargoes by the acts of the Alabama, the Florida, and the Shenandoah after leaving Melbourne, and (2) of the legal representation of these losses as entitled presently to their payment.

VIII. That an insurer who has paid the loss succeeds to the rights of the assured, and by a perfectly legal title (as a means and source of title to property) is as well settled as that of a grantee of land or a devisee by will takes the subject of the grant or devise.

This general and familiar rule of law has been applied to the recognition and protection of the insurer's right to the original owner's interest in just such a treaty indemnity fund as this by the highest authorities of this country.

Comegys vs. Vasse, 1 Pet., 193.
Rogers vs. Hosack's Exrs., 18 Wend., 318.

IX. The United States, then, is under the same trust obligation to recognize and satisfy the insurer's claim, by valid legal representations, to the indemnity originally attributable to the sufferer whose loss the insurer has paid, as to recognize and satisfy any other assignee's claim.

X. The trust obligations of the United States directly to the insurers whose claims, as assignees of the original owners, were placed in the hands of the Government for collection, by its interposition from Great Britain, are perfectly simple and equally imperative.

The United States have presented these claims of the insurers (1) to the British Government, and (2) to the Tribunal. They have been allowed and computed, with interest, in the award upon the same footing as the uninsured claims.

Point VII.

The United States received the money paid by Great Britain under the award charged with a duty to pay it over to the persons for whose losses it had been received as such indemnity, and to which indemnity these persons were lawfullly entitled.

The money paid by Great Britain to the United States was not paid for losses sustained or claims possessed by the Government of the United States in the capacity of owner, but was paid as an indemnity for certain specific, definite, well-ascertained losses of private individuals, which the Tribunal had, before the payment measured, computed, ascertained and determined, and upon the aggregate sum of the losses so ascertained rendered its judgment. Various treaties prior to the Treaty of Washington had been made by the Government of the United States with foreign countries, wherein it had received certain lump sums of money, like that of France negotiated in 1831 (J. C. Bancroft Davis, Revised Edition of Treaties, p. 290), under which the United States received from France the sum of twenty-five millions of francs as indemnity for certain losses alleged by the United States to have been suffered by its citizens during the Bonaparte regime. This payment by France took place before there was any judicial ascertainment of the claims of the citizens of the United States which should show their names, the amounts of their respective claims and the grounds upon which they were based. The loss referred to in the case of *Gracie vs. The New York Insurance Company, 8 Johns., 237*, was one of the losses included in this treaty. In regard to this loss, and long before the treaty was made, Chief Justice Kent, in delivering the opinion in the above case, said: "If France should at any future period agree to and actually make compensation for the capture and condemnation in question, the Government of the United States, to whom the compensation would in the first instance be payable, would become trustee for the party having the equitable title to the reimbursement, and this would clearly be the defendants (the underwriters) if they should pay the amount," which decision is quoted approvingly by Mr. Justice Story in *Comegys vs. Vasse, 1 Peters, 215*.

The award under discussion now before this Court was not made upon a guess, or even an estimate as to what ships and cargoes had been destroyed, or the value of them, or who were the individuals that owned them, but upon a most careful consideration of all the facts of the case under a decision limiting the area, so to speak, of the liability of England, an actual count of the vessels destroyed, with their names, their owners, their values, their insurances and all the data that went to make up the definite and certain judgment of the Tribunal. This money was received by the United States in payment of an indemnity, not of an estimated sum based upon supposed or fictitious claims, but of a sum arrived at by all the tests and aids that can make an amount definite and certain, and this Government received it not as its own money, but as money paid for an idemnification of certain definite well ascertained private losses.

The Treaty of Washington was different from anything that had ever preceded it. Under it Great Britain did not agree to give a definite sum to indemnify the United States and its citizens for alleged losses unknown in amount, ownership or the grounds upon which they were based, but she denied all liability on any ground whatsoever, and only agreed that the Court which should be organized under the treaty should first point out, if it could find, any ground for her liability, and if it did find such ground it should measure the limits of the liability, and after having made the measure of the limits should estimate its amount. This treaty did nothing practically but set up a Court, but the Court decided that there was a ground of liability in consequence of the violation by England of her neutrality; that the limits of it were defined by the acts of the three cruisers; that the amount of it was the sum of the depredations committed by them; and the including of the eighty-nine vessels within the limits made the persons entitled to the sums paid for those vessels absolutely and legally ascertainable as clearly and as plainly as if the award itself had specified their names and the amount due to each of them.

An award which points out the exact property destroyed, and for which an indemnity was adjudged, and places a value on the property for which the indemnity is to be paid, and which amount is made up of a sum of aggregate values, makes the ascertainment of the names and amounts due to each one of the owners of the aggregate values judicially certain. If these eighty-nine vessels, which were destroyed by the cruisers, had each one, after being taken, been run into the ports of Great Britain and laid up until the time had come for making the award, and had then been turned over by the terms of the award to the United States bodily and intact, can it for a moment be supposed that the Government ever owned those vessels, or that it would not have received them coupled with the duty of turning them over to their respective owners? The money of the award represents the sum of the aggregates of the values of the ships and cargoes destroyed, and stands in their place, and it cannot for a moment be doubted but that the same rule applies to the money as would have applied to the ships. The claim of the appellant on the fund is not an unadjusted, unascertained right against a general fund, but an ascertained and adjudged right against a special fund, which special fund is made up of aggregates, of which the losses paid by the appellant formed a portion, and which losses were considered by the tribunal when it made its award.

If there had been but one ship before the Tribunal, and the Tribunal had decided that Great Britain should pay the owner of that one ship (naming both him and the ship), and that money had come into the hands of the United States, they certainly would have received it charged with the duty to pay it over to the person designated. If there had been but one ship destroyed by the inculpated cruisers, and the Tribunal had said that Great Britain must make indemnification for that ship to the United States, and had named it, and Great Britain had paid the United States for it, nothing would have been left to the United States but to find out who was the owner of that ship and pay the money to him.

The ascertainment of this question would in no way affect the relation between the United States and the fund which had been paid to the United States for the use of such person as should prove himself the owner.

Carrying the argument one step further:—The Tribunal determined that Great Britain should make an indemnification for eighty-nine vessels destroyed by the Confederate cruisers. Their names are ascertainable; the amount was paid for them and for no other losses; their respective owners are ascertainable; the fact that these two questions are yet to be ascertained, in no way affects the relation of the Government to this fund. The unsolved questions are simply questions of proof; not questions whether or not a certain relation exists between the Government and the fund paid for the loss of those vessels. The fund was collected by the Government, and in its name, and the Government stands in the same relation to the fund that a guardian stands toward his ward; the ward cannot bring a suit while he is a minor, without the guardian. The citizens of the United States could not sue England except through the United States. The money which was paid to the United States in the one instance, and the money which would be paid to the guardian in the other, is precisely in the same situation; the receiver of the money is bound to account to the person who owns it. The payment of this aggregate sum adjudged as indemnity for these losses to the United States, a party who was adjudged not to be the owner of this sum, but in whose name it was collected, carries with it a duty devolving upon this person, and with which he is charged, to pay it over to the person who owned the property, and for which the indemnification is made, and who had a lawful right to it when it was received by the United States.

Point VIII.

THE ENGLISH DECISIONS IN REFERENCE TO CASES OF THIS KIND ARE NOT APPLICABLE TO THE CASE AT BAR.

The English decisions in respect to the *rights* of a person for whose claim a foreign power has paid an indemnity are based upon the idea that the citizen who is thus to be indemnified has no *right or title* to the money paid for the idemnification, but that such idemnification is purely a matter of donation.

In *Campbell vs. Mullett*, 2 Swan's R., 511, the Court advanced this opinion, and rested its decision upon it, holding that whatever had been awarded by the Commission which passed upon the claims was not upon the ground of *right*, but of hardship and injustice, and that the indemnity was not a matter of strict legal right. The case was not one of property recovered as a matter of right, but as a donation.

The same view was held in the case of *Burnand et al, against Rodocanachi et al*, 5 C. P. D., 424, Court of Appeal, 6 Q. B. D., 633, House of Lords, 7 Appeal cases 333, where the money recovered by Rodocanachi, before the first Court of Commissioners of the Alabama claims for the value of his cargo over and above the insurances was held to have been given by the Act of Congress as a pure gift so far as Rodocanachi was concerned.

These views are utterly at variance with the doctrine laid down by this Court in *Comegys vs. Vasse*, 1 Peters, 195, and followed in *Erwin vs. The U. S.*, 7 Otto, 392, and in *Phelps vs. McDonald*, 9 Otto, 298.

In *Baron de Bodè's case*, 13 Q. B. 364, Baron Parke delivering the opinion of the Court, called the attention of the Counsel directly to the point as to whether de Bodè had any right to the money claimed, or any part of it (p. 381). De Bodè's claim was brought before the Court in relation to a treaty which had been made between England and France respecting compensation for certain losses suffered by British subjects during the first French Revolution. A special remedy had been provided by the British Government in the shape of a commission to hear the claims, 59 G. III C. 31, and the question was whether it included all the claims, the Court said:

> "If no act of Parliament had been passed for the application of this money it might have been a question whether the British Sovereign could have applied it to any purpose that he chose; it might have been contended that, as it was received by him as the price of a release of the French Government from its obligation to compensate his subjects for their losses, he took the money clothed with a similar obligation to distribute it among his subjects by way of compensation; and that if he had been a private individual who had received money under the like circumstances, such a trust would have been implied, and might have been enforced in some way, according to the circumstances, either in a Court of law or one of equity, and, if so, that such subject had a remedy by a petition of right." He further said "that Parliament which was unquestionably competent to dispose of the money as it thought fit, and might have applied it to the public service of the year, or given it for any purpose, and so disappointed the just expectations of the claimant, had provided a special remedy," p. 384)."

In the case of *Rustomjee vs. The Queen*, 1 Q. B. D., 487—2 Q. B. D., 69, Rustomjee was a British subject and claimed an indemnity under the treaty between the Governments of Great Britain and China, by which a certain sum of money was to be paid by the Emperor of China, on account of losses of British merchants. Rustomjee filed a petition of right, and the Court held that the sovereign did not become a trustee for its subjects on whose behalf money had been received by the Crown, and that Her Majesty acted throughout the making of the treaty and in relation to each and every of its stipulations in her Sovereign character, and the disposition of the money should be left entirely to Her Majesty's discretion, and that there is simply a moral claim that it should be given to the right person to be ascertained as Her Majesty should be pleased to direct.

This doctrine is but the outcome of and in accordance with the doctrine promulgated by the British courts, that the money so received is a gift, to which the citizen under his claim of indemnity has no right, but that what he may receive is simply a donation.

An examination of the facts in relation to the treaty in de Bodè's case will show that there was nothing to indicate that the money which France paid to England was an indemnity for de Bodè's claim, or that de Bodè's claim was included in the subjects for which an indemnity was made. There was simply a lump sum given by France to England, and England was to pay such claims as might be proved.

In the case of *Rustomjee vs. The Queen*, the text of the treaty was as follows: Article 5 states that

> "His Imperial Majesty, the Emperor of China, further agrees to pay to the British Government the sum of $3,000,000 on account of debts due to British subjects by some of said Hong merchants, or Cohong, who have become insolvent, and who owe very large sums of money to subjects of Her Britannic Majesty."
>
> (See Hertslett's Treaties, Vol. 6 p. 222.)

Lord Coleridge, in discussing on appeal the terms of the treaty, said:

> "The sum is paid in gross, or in the rough, not as the ascertained total amount, but 'on account of debts due to British subjects by Chinese merchants,' who are said to owe not 'three millions of dollars,' nor 'the said sum,' but 'very large sums of money' to British subjects. The money was paid to the British Government, not for British subjects, but 'on account of debts due to British subjects.' It was paid as a lump sum in round figures. No specific sum was ever ascertained, either between the two Governments or between the British Government and the suppliant, as the amount of the suppliant's claim, and it is plain that no such specific sum was ever considered between the plenipotentiaries who negotiated the treaties." (p. 73.)

Comparing the facts of these two treaties with the facts of the case at bar, it will be seen that the widest differences exist. In de Bodé's case a round sum was paid by the French Government to the English Government. There is nothing to show that a list of the claims of the British subjects ever came before the plenipotentiaries, or the amount of the claims, or the owner, or anything except that it was a lump sum made up by guess. The criticism of Lord Coleridge in the Rustomjee case is sufficient to show exactly how little any ascertained fact passed into the consideration of the plenipotentiaries.

In the case at bar the arbitrators decided that Great Britain was responsible for eighty-nine vessels and cargoes. The names of the vessels, their valuation, their cargoes, their owners, were known to the arbitrators, and the claims were presented with all the detail and thoroughness which would mark the business transactions of individuals. The property which was paid for was specific, definite and certain. It was pointed out clearly by all the marks of identification, and the award was made to cover certain specific, definite pieces of property, and the proportion which the appellant owned in these specific, definite pieces of property that were paid for was not only known to the arbitrators, but is susceptible of the most careful judicial investigation and ascertainment.

Point IX.

THE SOVEREIGNTY OF THE UNITED STATES IS NOT A BAR TO THIS ACTION.

In the case of *Langford vs: United States* (101 U. S. Rep., 341,) this Court shows most clearly that within the jurisdiction conferred on the Court of Claims no suit could be brought against the United States for an act which was a tort of its officers, but it said,

> "We are not prepared to deny that when the Government of the United States by such formal proceedings as are necessary to bind it takes for public use, as for an arsenal, custom house or fort, land to which it asserts no claim of title, but admits the ownership to be private or individual, there arises an obligation to pay the owner its just value; and we are not called upon

> to decide that when the Government, acting by the forms that are sufficient to bind it, recognizes the fact that *it is* taking *private property* for public use the compensation may not be recovered in the Court of Claims. On this point we decide nothing."

In the case of the *United States vs. Taylor* (104 U. S. Rep., 216), the government had sold certain lands in Arkansas for unpaid taxes under and by virtue of its sovereign power to levy and collect taxes. It had paid itself the taxes due to it, and the balance which the property brought over and above the amount of the taxes was in its Treasury. This money came there by the exercise of the sovereign power of the Government, and was held there by the same power. No proceedings had been taken to confiscate it or to change the title to the money from the landowner to the United States, and no proceedings had been taken to divest his title to it, and no compensation had been given for it. It was the landowner's money, to which he was entitled on demand, and which it was the duty of the Government to pay to him.

The 36th section of the statute (12 Statutes at Large, p. 292) put into words the relation of the Government to the money and its owner, but these relations would have existed without the Statute definition and are in no way affected by it. These relations raised an implied contract, because the Government had received the money charged with the duty to pay it over to the landowner when he should call for it, and who had a lawful right to it the moment it was received by the Government. The fact that this duty rested on the Government, and that the landowner was possessed of this right, raised an implied contract within the ruling of *Knote vs. The United States* (95 U. S. 156), and in the presence of this implied contract the bar of the sovereignty melted away, and the Government stood face to face with the landowner in no better position than if it had been a private individual who had sold the landowner's property on a judgment and had realized more than sufficient to pay the debt and attendant expenses.

In the case now at bar the Government took the appellant's claims by his consent. It presented them at Geneva, received the money for them, and they were cancelled as claims against Great Britain. The United States received this money by the appellant's consent and at his solicitation and without any tort as against the claimant or his predecessors in title. The money being paid the United States as an indemnity for our property it came into the possession of the Government unstained by any tort on the part of the Government, and thereupon arose the duty to pay it to the appellant, as money to which the appellant is entitled, and in relation to which an implied contract exists between the United States and the appellant, and to which the sovereignty of the United States is no bar.

Point X.

THE STATUTORY PROHIBITION DOES NOT DEPRIVE THE COURT OF CLAIMS OF JURISDICTION OF THE CASE AT BAR.

Section 1066 of the Revised Statutes provides that "the jurisdiction of said Court shall not extend to any claim against the Government not pending therein on December first, 1862, growing out of or dependent upon any treaty stipulation entered into with foreign nations or with the Indian tribes."

The question is, whether under the circumstances, the claims of the insurance companies to their proportion of the award received by the United States "grow out of or are dependent upon" the stipulations of the treaty of Washington?

First. What is the meaning of the terms "grow out of or dependent upon" as used in the section under consideration?

"Grow out of," is equivalent to the expression "originate in," so that the claims presented, in order to be excluded from the jurisdiction of the Court, must have had their origin in the treaty stipulations.

The first article of the treaty of Washington speaks of the claims against Great Britain as "growing out of" the acts committed by the several Confederate vessels. In this connection, "grow out of" evidently has the meaning of having their origin in, as the appellant insists is their signification in Sec. 1066.

"Dependent upon," does not enlarge the meaning of "growing out of." It refers to the connection between the claims and the treaty stipulations after the latter have given birth to them. "Dependent upon," expresses the relation which one thing bears to another, as its efficient or determining cause.

The original claims, as article first of the treaty shows, were claims against Great Britain growing out of the acts which the Confederate cruisers did. They were in no sense claims against the United States. It cannot be pretended that any liability on account of them could have been asserted against the United States. The claims against this government arose out of its refusal to pay the insurance companies, which allege that it was for their use that the money was received.

Do these claims have their origin or grow out of the treaty stipulations? I maintain not. *They have their origin in the receipt of the money for claimants, and the refusal of the Government to pay it over to them.*

It is manifest that the circumstances out of which the claims originally grew were not created by the stipulations of the treaty. They consisted of culpable acts of Great Britain, happening long before the treaty was made.

It is equally clear that the particular claims of this insurance company against the United States did not grow out of the treaty stipulations, but out of events happening long after the stipulations of the treaty had been performed and the powers it called into being had been exhausted. It is claimed that the Government is liable to claimant, because, as agent or bailee, it received his money, and, in disregard of the obligation and duty which such receipt imposed, refused to pay it over to the party entitled. With these acts the treaty had nothing to do. It is true that, but for the treaty stipulations, the United States would not have had the money in the treasury; that as a result of the treaty Great Britain paid the money to the United States, and that it is for this money the claimant sets up his demand. But on what ground can it be said that the claims grow out of these stipulations?

The United States, if liable to the claimant, is so because of the breach of the contract which the law implies between them, arising out of the receipt and refusal to pay over the money on the part of the former.

If the money belongs to the claimant and the law implies an obligation to pay it over to him, the claim does not grow out of the processes by which it was obtained, but out of the violation of the contract implied at the time the money was received. The claim does not originate in the processes of collection which the Government might pursue, but out of its acts subsequent to its collection. In other words, the methods by which the money reached the treasury are not the source of the claim, but acts independent of them, and occurring after the employment of these methods had ended.

Suppose that A has a claim against C, which he gives to B to collect, with power to submit to arbitration. In pursuance of such power B and C submit the claim to arbitration, and money is awarded to A, which B receives, for which upon demand he refuses to account. A then brings his action against B for not accounting, or for money had and received.

It is manifest that A had no claim against B until after the award had been made, and B had received and refused to account for and pay over the money he had collected under the award. A's claim against B did not grow out of the contract of arbitration nor any of its stipulations, but out of B's failure to perform his duty to A *after* the money had been received and all the stipulations of arbitration had been executed. The fact that the Government is the agent for the collection of the claim cannot change the rule. The claims do not grow out of the stipulations of an agreement of arbitration in the latter case, any more than in the former.

To recapitulate upon this point: There could be no claim against this Government on the part of the claimants until the money had been collected by it. It was until then a claim against Great Britain. It matters not by what process it was collected, the claims cannot grow out of the process of collection. Based upon the original claims against Great Britain, they do not become claims against the United States until the latter have received the money and done something with reference to it of which the claimants can complain, and out of which alone their cause of action grows. The agreement of arbitration and the making of the award are the mere channels through which the money comes into the treasury, and neither creates the claims of the claimants nor their right to assert them.

Second. The section of the Revised Statutes under consideration, in substance, means that no action can be brought in the Court of Claims, where the claim to be asserted is so based upon treaty stipulations that, in order to show cause of action, they must be set out in the petition. But, in the present case, this is not necessary.

Averments that the Government undertook to collect the claims of the insurance companies, did in fact collect, and afterwards, upon demand, did refuse to pay the money over to claimants, are all that are necessary to show that they are entitled to recover. Proof of treaty and its stipulations is only necessary to show in what way the money came into the hands of the Government; it is not required to establish the obligation of the Government to pay the money nor of the right of the claimant to receive it.

The action is not founded upon the treaty nor the award, but upon the refusal to account for and pay over to the parties entitled the money which the award brought into the treasury.

Third. To establish the proposition that the claims of the insurance companies grow out of the stipulations of the treaty of Washington, reliance must be placed upon the facts, that the claims were referred to arbitration by treaty, that an award was made, under its provision; and that the United States received the money in pursuance of the award. It will not be denied, that the treaty contains no stipulation as to what the United States should do with the money, and that the United States assumed in the treaty no obligations as to its distribution. Under these circumstances it is difficult to see how any rights of the claimants to the money is affected by the treaty. Such right exists independently of it, growing out of the duty the Unites States owes its citizens under its form of government, to be asserted as its municipal laws may provide. When a treaty imposes a duty upon the United States as to its citizens, then the claim of the citizens to what is thus provided for them grows out of the treaty stipulations; but when the *laws of the land* impose a duty upon the government which is violated, it would seem clear, that the claims for redress grow out of such violation, to be enforced as the laws may prescribe, unaffected by the accidental fact that the subject matter, as to which that duty was imposed, fell within the jurisdiction of the United States, through the operation of some treaty provisions.

Fourth. It may be objected, if the construction the appellant contends for is to be adopted, that all claims against the United States, which may constitute the subject matter of a treaty, or to which a treaty may relate, will be held to grow out of the obligation of the Government to pay, and of the claimant to receive the money, so that no claim can be said to grow out of treaty stipulations.

But the distinction between claims plainly growing out of a treaty, and those under consideration is a clear one.

Here the claims originally were against Great Britain, and if that government had violated its neutrality, they were claims which it was bound, under the principles of international law, to pay; for it is well settled that when a capture of enemy's property is made within neutral territory, or *by armaments unlawfully fitted out within the same*, it is the right as well as the duty of the neutral state, when the property thus taken comes into its possession, to restore it to the original owners.

Lawrence's Wheaton on International Law (6th Ed.), 499.

It is true that in this case the property captured did not come into the possession of Great Britain; but the duty to make compensation would seem to follow from the principle laid down in the foregoing text from Wheaton. It is claimed that Great Britain refused to admit, as propositions of law, the three neutral rules laid down in the treaty of Washington. While there has been some dispute on this subject, yet the weight of authority is heavily in favor of the proposition that these rules express the duties of neutrality, as they had been established by international law, long before the treaty of Washington was made. Certainly, so far as this case was concerned, it was agreed between the high contracting parties, that the duty of Great Britain as a neutral toward the United States at the time the Confederate cruisers did the acts complained of, was to be found in the three rules set out in the treaty. They express the principle that when a failure occurs to use all the means in the power of a neutral to prevent a breach of the neutrality of its soil or waters, there is an obligation on the part of the neutral to make compensation for the injury resulting therefrom. Nor was this a new doctrine. It had been from the beginning of this Government recognized as the true one upon the subject. It had met with the approval of the most learned commentators on international law, and been accepted as the rule of neutrality by most of the nations of the world. Great Britain had insisted upon it as against the United States, and one of the first treaties (in 1794) between the two nations had provided for the settlement of claims in behalf of English citizens against the United States, upon the basis of that principle.

It being the duty of the British Government to make compensation for the losses which the Confederate cruisers did, the claimant had the right to insist upon payment from it.

These claims continued to be claims against Great Britain until the liability upon them was discharged by the payment of the award made at Geneva. Then, for the first time, the United States assumed liability upon them. No claim against this Government could be made until then, and not until it was in some default as to the money which it had received.

If Great Britain had refused to pay the award, the insurance companies could not have insisted upon the payment of their original claims as such. They were merged in the award, and their claims then, if subjects of judicial cognizance in the British Courts at all, would rest entirely upon the decision of the tribunal which the treaty created, and therefore would grow out of treaty stipulation.

The doctrine of the subject of merger is laid down in Morse on Arbitration and Award, page 490: "Like a judgment, the award operates to merge and bar the original claim. After the award has been rendered, the suit must be upon it or upon the covenants of the submission or bond. The subject matter of the arbitration no longer subsists as an independent cause of action. As such it has been completely disposed of."

The form of the award in this case might have disabled any of the claimants from going into the British Courts without the permission of the United States, or might have required that the United States as the party to which the money was awarded should prosecute the claim in their own name. But whatever the remedies which might be given by Great Britain for procuring the money, and whether or not there were any remedies at all, all the claims after the award had been made must be regarded as merged in it and depended upon it.

These considerations show plainly what would be claims growing directly out of treaty stipulations. Suppose that claims against the United States for violation of contract had been asserted by citizens of a foreign government, which allowed our citizens to bring action in its courts. Of these claims the Court of Claims could take jurisdiction. But if they had been referred to a tribunal by a a treaty for ascertainment, and an award under the treaty had been made against the United States in favor of the individual claimants, then they could not bring their action in this Court, because the claim, having been merged in the award, would grow out of the treaty stipulation, and could not be sued upon, except by setting out in the petition the treaty and the award made under it.

It will throw much light upon this subject to inquire into the history of treaties in the disposition and adjustment of claims of citizens of this country against foreign governments, and of their citizens against our government.

Fifth. The claims which have been so the subject of settlement are of various kinds, and may be classified as follows:

First Class. The claims of citizens of foreign governments against our own, for losses occasioned to them by acts of American citizens, or on American soil or waters, in violation of American neutrality.

Second Class. The claims of American citizens against foreign governments for losses occasioned through a breach of their neutrality, to American property and commerce.

Third Class. The claims of citizens of this government against foreign governments, or of their citizens against this, growing out of the violation of treaty stipulations previously agreed upon between them, in which may be included the claims of persons suffering loss, in times of peace, to their persons or property, who were entitled, under treaties, to the protection of the municipal laws of the country, where they may have suffered the loss.

Fourth Class. The claims of the citizens of either this or a foreign government, for injuries done by one, while a belligerent, in violation of the rights of citizens of the other, while in a state of neutrality.

The only question which is to be considered here is to what extent do these claims, having been referred by treaties to arbitration, under which an award has been made, "grow out of" or become dependent upon "the stipulations of such treaties?"

From what has been said, it will be seen that the first class (being claims of foreign citizens against this Government for breach of its neutrality) grows out of the treaty stipulations, because, after the award has been made, the original claim has been merged in it, and no action can be brought for the money in the Court of Claims because it would be brought upon the award and the provisions of the treaty.

The third class, which arises from the violation by the one Government or the other of provisions of a treaty previously existing, so plainly grows out of treaty stipulations, that nothing further need be said to show that the jurisdiction of the Court of Claims does not extend to them.

In the fourth class are included those claims, which a neutral Government may assert against a belligerent, when in the prosecution of the war the belligerent does injury to the persons or property of citizens of such neutral Government.

These claims may be divided into two classes: (1) Those growing out of illegal acts committed by the belligerent within the neutral jurisdiction, and (2) those growing out of the capture and destruction of vessels and cargoes upon the high seas, to which it is claimed the privilege of neutrality is attached.

The rules as to what are the rights of neutrals on the high seas have been in constant dispute for centuries, so that no universally accepted principle of international law on this subject seems to have been established. It is now the recognized rule of most maritime countries that the neutral flag covers enemy's goods with the exception of contraband of war, and that neutral goods, with the exception of contraband of war, are not liable to capture under the enemy's flag. This is contained in the Declaration of Paris, of 1856, to which, however, the United States was not a party; so that this Government is not bound by it, although during the civil war both parties observed the rule as there stated.

As between the United States and foreign nations, the principles to govern in cases of capture by a belligerent on the high seas are fixed by treaties, so that any claims against foreign nations belligerent, for damages done to American citizens upon the high seas, would grow out of the stipulations of those treaties.

When the injuries complained of grow out of the illegal acts of a belligerent within neutral waters or territory, the assertion of demand for payment on account of them is governed, in that respect, by a different principle from that which controls other claims. The demand for compensation for such illegal acts must be made by the neutral government. All the authorities seem to agree, that capture within neutral territory can only be averred, in support of a claim for restoration of property taken or compensation, by the accredited agent of the government whose neutral immunity has been thus infringed.

In the *Purissima Conception*, 6 Robinson, 45, Lord STOWELL said that "it is a known principle of this Court, that the privilege of territory will not of itself inure to the protection of property, unless the State, from which the protection is due, steps forward to assert the right."

In the Sir William Peel, 5 Wallace, 517, it was held:

> "If a ship or cargo is enemy's property or either is otherwise liable to condemnation, the circumstance that the vessel at the time of capture was in neutral waters, would not, by itself, avail the claimants in a prize court. It might constitute a ground of claim by the neutral power, whose territory has suffered trespass, for apology or indemnity. But neither an enemy nor a neutral acting the part of an enemy can demand restitution of captured property, on the ground of capture in neutral waters.'

In Lawrence's Wheaton (6 Ed., p. 494) it is said:

> "Though it is the duty of the captor's country to make restitution of the property thus captured within the territorial jurisdiction of the neutral State, yet it is a technical rule of the prize courts to restore to the individual claimants in such cases, only upon application of the neutral government whose territory has been thus violated. This rule is founded upon the principle, that the neutral State alone has been injured by the capture, and that the hostile claimant has no right to appear for the purpose of suggesting the inviolability of capture."

In the *Lilla*, 2 Sprague R., 177, it was held that "no private person can interpose a claim in case of prize, on the ground that the capture was made in neutral waters. Such claim can only be made by the neutral nation whose rights have been infringed."

In all the cases where the neutrality of a country has been invaded by a belligerent, and property of a citizen of the neutral country or of the enemy been captured within its jurisdiction, it appears that the government alone whose immunity has been attacked can make a demand for apology or restitution. It is regarded as an affront to the neutral power, which it alone can complain of. The individual suffering loss can do nothing. If the neutral government refuses to step forward, the fact that the capture took place on neutral territory will not, of itself, authorize restitution in a prize court.

Under these circumstances the individual suffering having no claim against the neutral government, nor against the government of the captor, unless the former sees fit to interpose in his behalf, he is at the mercy of the neutral government and can claim nothing which it does not please to give. There would seem to be no claim in his behalf which he can assert or enforce, and a failure of the neutral government either to ask for reparation from the belligerent, or to pay over to him money it might have received from the belligerent, for its offenses against the neutral sovereignty, would leave him without any remedy. The whole power over the subject being vested in the discretion of the neutral government, he could complain of nothing which, in the exercise of that discretion, the neutral government might do.

In the event of an arbitration of the questions between the neutral government and the belligerent, and an award of indemnity to be paid by the latter, the receipt of the money by the former would give rise to no claim to the individual against it. It would be in satisfaction entirely of the national wrong, and no citizen could demand as a right any amount of the indemnity as his own. The distribution would depend entirely upon the disposition of the government which had received it, charged with trusts for no one.

It is therefore clear that no *claim* could arise under these circumstances against the United States, of which any court could take jurisdiction.

This review of the claims arising under treaties will show those of which the Court of Claims can take no jurisdiction.

1. Those cases where, under the rules of international law, the claims for losses can be asserted by the Government alone, and where, therefore, the individual suffering can have no *claim* against his government for any money it may have received in satisfaction of the public wrong done it, as in the case last cited.

2. Those claims for injuries which grow out of the stipulation of a treaty, existing before the doing of the acts complained of, by which the injury was done.

3. Where the claim is one asserted against the United States for acts done in violation of its neutrality, and which has been merged in an award made in pursuance of a treaty.

4. There is another class, growing out of treaties, where an award has been made of a specific sum *en bloc*, and where it was expressly provided in the treaty that the United States should exercise its own discretion in paying it out. Here it is clear that no person can complain of any distribution which the United States might make.

5. Claims which grow out of some promise or assumption, made by the Government in the treaty itself, plainly grow out of treaty

stipulations, and, therefore, are excluded from the jurisdiction of the Court of Claims.

6. Another class is found in those claims which have no existence, except in violation of treaty stipulations, and in which they have their sole origin. Such claims are those which grow out of treaties with Indian tribes. Demands for those things which the treaties provide could have no existence, if it were not for the treaties, and, therefore, plainly grow out of their stipulations.

The foregoing includes all the claims which have become the subject matter of treaties, except those contained in the second class, as enumerated at the commencement of this division, which are claims of American citizens, while their Government is a belligerent, for injuries done to their vessels or cargoes, by a foreign neutral government in violation of its duty of neutrality. Their claims, so specified in the second class, differ from the others considered in several important particulars.

(*a*) They are claims against foreign governments for which it is the duty of such governments to make compensation, and which the individuals suffering might assert against them in their own Courts, wherever by their laws such Courts have been invested with jurisdiction in cases of torts, and foreigners are admitted to sue in their judicial tribunals.

(*b*) They do not grow out of any treaty stipulations which impose the duty upon neutral governments, but out of the principles and rules of international law, by which, independently of treaties, the conduct of one government towards the citizens of another is regulated. Upon this point, see the very able statement of the American case before the Geneva Commission, as to the duties of a neutral, pp. 47, 59, *et seq.*, Vol. 1, Papers Relating to Treaty of Washington.

(*c*) Where such claims are referred to arbitration and an award is made, which has been received by the government whose citizens have been injured, *the claims against the neutral government are merged in the award*, and a new claim arises against the belligerent government receiving the money, as soon as it is in default toward those, on account of whose injuries and losses, it received it.

In this case the only claims which the insurance companies assert grow out of the duty which the United States owe to them, a duty which its receipt of money for the use of the companies imposed upon them, and which in no sense can be said to arise from the stipulations of the treaty, which provided the method by which the money was paid.

If this view be correct, the appellant is not excluded from the Court of Claims because of the restriction upon its jurisdiction imposed by Sec. 1066 of the Revised Statutes.

Sixth. This section has received some consideration from the Court of Claims, which has entertained jurisdiction and laid down principles which would authorize the entertaining of jurisdiction in cases like the present. I call attention to the cases from the Court of Claims' reports. In *Meade vs. U. S.*, 2 N. and H., 302, Mr. Justice NOTT said : " In such a case " (where money had been paid by a foreign government under a treaty, which in terms appropriated it to certain parties), " the suit would be an equitable proceeding " (in the Court of Claims) " against the fund, analogous to an action at law for money received by A to the use of B."

In *Tyers vs. U. S.*, 5 Ct. of Cl., 509, the Court said, that money paid by China, under an award made in pursuance of a treaty, would have been recoverable in the Court of Claims on a claim for money had and received, had no other tribunal been first appointed.

In *Weile vs. U. S.*, vol. 7 Ct. of Cl., 535, the action was brought to recover the balance of a sum of money which had been paid to the United States under an award made in pursuance of a treaty. The Court entertained jurisdiction of the case.

These cases do not differ from the present one, except in the fact that the parties entitled to receive the money had been ascertained by the treaty, or by a commission appointed under its provisions. This fact does not affect the proposition that parties entitled to money received by the United States, under an award, can maintain an action to recover it in the Court of Claims ; it only concerns the method by which the persons entitled can be ascertained. It does not involve the question of jurisdiction, only the question of proof.

If Sec. 1066 does not deprive the Court of Claims of jurisdiction in the cases above cited, it certainly does not in the present one, for the claims here no more grow out of treaty stipulations, than those on which it was considered action might be brought.

In *ex parte* Atocha, 17 Wall., 439, Sec. 1066 was considered and construed by this Court. The facts of the case are as follows :

Atocha, an American citizen, had a claim against Mexico for losses sustained by reason of his expulsion from that country in 1845. By the treaty of February 2, 1848, the United States exonerated Mexico from all claims of citizens of the United States which had previously arisen against it, and engaged to satisfy them to an amount not exceeding $3,250,000.

They also stipulated for the establishment of a Board of Commissioners to ascertain the validity and the amount of the claim. The exoneration of Mexico from the claims of the citizens of the United States, and the assumption of their payment in their amount named, were in part consideration of the acquisition of territory by the United States, after the Mexican war. After the Board of Commissioners had been appointed, Atocha filed his claim before it, but it did not appear by the record of the board, whether it was acted upon, or what proceedings were taken in reference to it. After the claims which had been allowed by the board were paid, the limit of the amount to be devoted to the payment of claims was not exhausted. On February 14, 1865, Congress passed a special act for the relief of Atocha, and by it directed the Court of Claims to examine into his claim and provided that if the Court were of the opinion that the claim was a just one against Mexico, when the treaty of 1848 was ratified, and was embraced by that treaty, it should fix and determine its amount, and declared that such amount should be paid to the extent that it should not exceed the amount which the United States assumed to pay in the treaty.

Decision was rendered in the Court of Claims in favor of Atocha. From this decision appeal was applied for by the United States, but the Court of Claims refused it. On motion of Attorney General an alternative writ of mandamus was directed to the Judges of that Court to allow the appeal. Upon a demurrer to a return of the Judges, the question considered was presented to the Supreme Court.

Mr. Justice FIELD delivered the opinion of the Court. He said: "But the Act" (March 3, 1863) "at the same time declared that the jurisdiction of the Court should not extend to or include any claim against the Government, not pending in the Court on the 1st of December, 1862; growing out of, or dependent upon any treaty stipulations entered into with foreign nations or Indian tribes. All the cases in which the Court subsequently takes cognizance, by either the original or amendatory Acts, were cases arising out of contract or transactions between the government or its officers and claimants. And in their decisions, the Court was to be governed by those established rules of evidence which determine controversies between litigants in the ordinary tribunals of the country.

"Those Acts have since then applied only to claims made directly against the United States, and for the payment of which they were primarily liable if liable at all, and not to claims against other governments, the payment of which the United States had assumed or might assume by treaty."

In the foregoing extract, the opinion of the Court is, to some extent, suggested as to claims of which the Court of Claims can take jurisdiction under Section 1066.

1. They must be claims "arising out of contracts or transactions between the Government or its officers and claimants."

2. They must be "claims made directly against the United States and for the payment of which they were primarily liable."

3. They *must not* be "claims made directly against other governments, the payment of which the United States had assumed or might assume by treaty."

Seventh. A slight investigation of the claim of the appellant in this case will show that, by the application of the tests above suggested, they are not excluded from the jurisdiction of the Court of Claims.

1. They arise upon the implied contract between the Government and claimants, which requires the former to account for and pay over money received to the use of claimants whenever it shall be thereunto requested.

2. They are claims for which this Government is primarily liable. They may and did have their origin in the Alabama claims, but these were never claims against the United States, but Great Britain, and as such against the Goyernment become merged in the award, as above shown. The claims for breach of duty on the part of the United States never arose until after the award was paid and money was refused to claimants; and therefore the United States could alone be primarily liable upon them. There is no conceivable case in which a foreign government could be primarily liable to an American citizen, for a breach of duty on the part of his government towards him.

3. The United States never assumed by treaty to pay to the appellant any of the money it received. It is not upon the ground

of any assumption in the treaty to pay, that the claims of the appellant rest. They depend upon the acts of the United States after all the powers created by the treaty had been exhausted. Great Britain assumed in the treaty, to pay any sum which might be awarded, agreeing to pay it in coin to the United States, at Washington, within twelve months after the date of the award. This government undertook nothing as to the award. It was simply to be the recipient of the amount paid. After that the right of parties and the obligations of the government were to be determined by the ordinary rule of municipal law, and by the provisions of the statutes of the United States relative to the administration of justice. The Government in the treaty promised and assumed nothing. With the subsequent disposition of the fund treaty stipulations had nothing to do.

Not so in the Atocha case. There, the Government assumed to pay claims of American citizens against Mexico to a certain amount, in part consideration for the territory acquired by the United States at the close of the Mexican war. There could have been no liability asserted against the United States, except upon their assumption of the claim contained in the treaty stipulation. It is too plain for argument that such claims grew out of these stipulations. The United States were in no sense the agent of the claimants, and the only relation out of which the liability could be asserted against them has its sole origin in the provisions of the treaty. The Board of Commissioners provided by the treaty was to ascertain the persons entitled, and judgments were to be paid out of the treasury to the extent of $3,250,000. Here no trust was created for any one, and the whole duty of the United States was to pay the awards which the Commission might render.

From the foregoing discussion, the following propositions may be derived by which to determine what claims are excluded from the jurisdiction of the Court of Claims under section 1066:

(1) When the United States receive from a foreign nation money under an award, paid in pursuance of a treaty, by the provisions of which the parties entitled to receive such money are ascertained or made susceptible of ascertainment, prior to the payment of the award, then, upon the receipt of the money, an implied contract arises between the United States and the parties entitled, out of which alone the claims of such parties as against the United States arise, and, therefore, they do not grow out of treaty stipulations, so as to deprive the Court of Claims of jurisdiction over them.

(2) But when the United States in the treaty expressly assume the payment to its citizens of claims against a foreign nation, the persons entitled to be ascertained after the money has been received, or when they receive money *en bloc* from foreign nations, in satisfaction of claims against them, which, by the terms of the treaty, is to be distributed in the discretion of the United States, or when the parties entitled are to be ascertained by rules and principles which the United States may prescribe or establish, then the Court of Claims has no jurisdiction.

Eighth. In a review of the provisions of treaties to which the United States is a party, relative to disposition by them of money which has come into their possession under awards, the correctness of the foregoing propositions will be illustrated.

Treaty with Brazil in 1841 (page 104 of Mr. Bancroft's Revised Edition of Treaties, published by the State Department in 1873). Article 1 of the treaty states that the two governments have mutually agreed to adjust their difficulties, and to do that in a single act, it is provided, "it becomes the duty of Brazil in order to carry this agreement into execution to place at the disposition of the President of the United States, the amount of 540,000 milreis * * as a reasonable and equitable sum; * * * and as full compensation for the indemnification of said States, to be paid in a round sum without reference to any one of said claims upon the merits of which the two high contracting parties refrain from entering, *it being left to the Government of the United States to estimate the portion that may pertain to the claimants, for the purpose of distributing among them the aforesaid sum of 540,000 milreis, as it may deem proper.*"

Under this treaty it could not be claimed that there was any implied contract between the United States and any one, upon which an action could be brought.

Treaty with China (*Ib.*, page 164). This provides that debentures should be issued to the amount of 500,000 teals in satisfaction of claims of American citizens, to be delivered to such persons as were to be named by the minister or chief diplomatic officer of the United States. Here the parties entitled were to receive the money or debentures directly from the Chinese Government.

Treaty with Denmark (*Ib.*, page 210), Article 1. "His Majesty the King of Denmark renounces the indemnities which might be claimed from the Government of the United States. * * * And His Majesty engages, moreover, to pay to the said government the sum of 650,000 Spanish milled dollars on account of the citizens of the United States who have preferred claims relating to the seizure, detention, condemnation or confiscation of their vessels, cargoes or property whatsoever by the public and private armed ships, or by the tribunals of Denmark, or in the states subject to the Danish sceptre."

Article 3 provides: "To ascertain the full amount and validity of the claims mentioned in Article 1, a Board of Commissioners consisting of three citizens of the United States, shall be appointed by the President, by and with the advice and consent of the Senate, who * * * shall receive, examine, and decide upon the amount and validity of all such claims according to the merits of the several cases and to justice, equity, and the law of nations."

Under this treaty no implied contract upon receipt of the money could arise between the United States and parties entitled to receive it. The Government assumes to appoint a board of commissioners to examine and ascertain the claims. No breach of duty could be charged against the United States, except upon its failure to appoint such board, and a claim against them upon that account plainly grows out of the treaty stipulation.

Treaty with France (*Ib.*, p. 275) of 1803. This provided for the cession of Louisiana, for which the United States were to pay France sixty millions of francs. Of this consideration twenty millions were to be paid by the United States in satisfaction of claims of the United States against France, which had been allowed by France, and which that nation had agreed to pay. The method of payment was by the issuing of orders upon the Treasury of the United States, drawn by the Minister in France, after a commission of three persons, which was to be appointed by the Minister, had examined the claims and issued a certificate to the persons entitled to receive payment under the provisions of the treaty.

Here, then, was an assumption by the United States of these claims against France, and of which, under the Atocha case, the Court of Claims could entertain no jurisdiction.

Treaty with France of 1831 (*Ib.*, page 290). Article 1 provides, "The French Government, in order to liberate itself completely from all the reclamations preferred against it by citizens of the United States, for unlawful seizures, captures, sequestrations, confiscations or destruction of their vessels, cargoes, or other property, engaged to pay a sum of twenty-five millions of francs to the Government of the United States, who shall distribute it among those entitled, in the manner and according to the rules which it shall determine."

Under this award the United States received the money, charged with no duty to pay it to any particular individual. It assumed to distribute the fund at its discretion. Failure to pay any one would give rise to no claim, and if it did it would be a claim, and if it did it would be a claim which grows out of refusal to perform a duty which the treaty imposed.

Treaty with Great Britain (*Ib.*, page 321) of 1791. Article 6 provides for the payment of claims of British subjects against the United States, where the creditors had been unable to obtain full compensation. The United States agree to make full and complete satisfaction to them. A commission was appointed to ascertain the amount of claims and the claimants; and the United States undertook to pay the amount to the claimant at such time and as the commission shall prescribe.

Here the whole obligation of the United States arises, from its agreement to pay as stipulated in the treaty, and a claim growing out of a refusal to pay grows only out of this treaty stipulation.

Article 7 provides for the payment of claims of American citizens against the British Government, for which the latter agrees to provide compensation. A commission was to be appointed to examine into the claims and to decide them according to the merits of the several cases and to justice, equity and the laws of nations. Great Britain agreed to pay the amounts awarded to claimants in specie at such times and places as should be fixed by the commission.

Here, if the money had been paid to the United States by the direction of the commission, the claimants would have the right to insist upon payment from them upon the implied contract. The claims in such cases would not grow out of any treaty stipulation, but out of the contract, and would come within the jurisdiction of the Court of Claims.

Treaty with Mexico of 1848 (*Ib.*, p. 583). This treaty provides for the acquisition of additional territory, for which the United States agree to pay $15,000,000, and "engage to assume and pay to the claimants all the amounts now due them, and those hereafter to become due, by reason of the claims already liquidated, and decided against the Mexican Republic," and, "furthermore discharge the

Mexican Republic from all claims of the United States, not heretofore decided against the Mexican Government, which may have arisen previously to the date of the operation of the treaty." The United States therefore agrees to make satisfaction for the latter class of claims to an amount not exceeding three and one-quarter millions of dollars.

Treaty with Peru (page 673), Article 1, provides: "The Peruvian Government, in order to make full satisfaction for various claims of citizens of the United States, on account of seizures, &c., of their vessels, or for the damage and destruction of them or of their cargoes, at sea and in the ports and territory of Peru by order of said Government of Peru, or under its authority, has stipulated to pay to the United States the sum of $300,000, which shall be distributed among the claimants in the manner and according to the rules that shall be prescribed by the Government of the United States."

Claims under this treaty are governed by the decision in the case of Atocha, where the claim there considered grew out of its stipulations.

The remarks made concerning the treaty with France of 1831 apply here.

Treaty with Portugal of 1851 (*Ib.*, page 705). Portugal agrees to pay to the United States $91,727 as a sum equivalent to the indemnity claim of several American citizens, "which sum the Government of the United States undertakes to receive in full satisfaction of said claims and to distribute the same among the claimants."

Here the United States were clearly under the implied obligation to pay the money to the parties entitled, and the Court of Claims could have entertained jurisdiction.

Treaty with Spain of 1795 (*Ib.*, page 787). The award was to be paid in "specie, at such times and places and under such conditions as should be provided by the Commission." If the United States were to be paid the money under the decision of the Commission, then they would be bound to pay it to the parties entitled, and would receive it charged with that obligation.

Treaty with Spain of 1819 (*Ib.*, page 792). This treaty relates to the purchase of Florida. Article 11 provides, "The United States, exonerating Spain from all demands in future, on account of the claims of their citizens to which the renunciations herein contained extend, and considering them entirely cancelled, under-take to make satisfaction for the same to an amount not exceeding five millions of dollars."

These claims are within the rule in the Atocha case, relating to treaties where the United States assumed payment of claims of their citizens against foreign governments.

Treaty with Spain of 1834 (*Ib.*, page 785). Article 1 provides for the payment by Spain of twelve millions of reals to be "distributed by the Government of the United States among the claimants entitled thereto, in such manner as it may deem just and proper."

Treaty with the two Sicilies (*Ib.*, page 856). That government agrees to pay 2,115,000 ducats to the United States, part of it to be applied to a particular purpose, "the residue to be distributed among the claimants by the said Government of the United States in such manner and according to such rules as it may prescribe." Under the last two treaties no claims could be asserted in the Court of Claims, unless there was particular legislation to that effect.

There are several treaties, in which claims have been referred to commissioners, who were to decide upon the claims, ascertain the claimants and make an award to them. In some cases certificates were to be issued to parties entitled, and in others not, but in all cases the money awarded was to be paid to the United States, and was to be in satisfaction of the claims referred to arbitration. In all such cases, I maintain, the money came into the hands of the United States, charged with the obligation to pay it to the parties entitled; that their claims to it grew entirely out of the implied contract between them and the United States and that of them the Court of Claims might have entertained jurisdiction. Such treaties are those with Chili in 1858 (*Ib.*, p. 130), Costa Rica in 1860 (*Ib.*, p. 202), with Ecuador in 1862 (*Ib.*, p. 238), Great Britain in 1854 (*Ib.*, p. 382), Mexico in 1839 (*Ib.*, p. 557), Paraguay in 1847 (*Ib.*, p. 654), Peru in 1862 (*Ib.*, p. 691) and Venezuela in 1866 (*Ib.*, page 895).

There are also the Indian treaties, in which the Government agrees to pay sums of money, or grant land to tribes or individual Indians. If the Government neglect or refuse to carry out the provisions of these treaties, it is clear that no action could be maintained against it in the Court of Claims, because the claims would grow entirely out of the treaty stipulations.

This review of the treaties shows the capacity in which the United States received money under awards made in pursuance of their provisions, and the nature of the obligation they assume under them.

The conclusion is that, viewed in this light, there are four classes of claims which may be asserted under these treaties :

1. Claims against the United States, where they have assumed to pay claims of their own citizens against foreign governments, from which the latter have been exonerated.

2. Claims where the Government has received money under an award, which the United States have assumed to pay in such manner as they may determine, the claimants and the amounts to be paid to them, to be ascertained as the United States may prescribe, after the money comes into its possession.

3. Claims against the United States for a failure to make provision for payment of claims, or debts, or to perform stipulations and promises, where obligations to do so are first imposed by the provisions of the treaty, as in case of Indian treaties.

4. Claims against the United States for money which may have been awarded to certain individuals or classes, before the money was paid, and which, therefore, came into the hands of the Government to be paid to them for whose use it was intended.

The first three grow out of treaty stipulations only, and there is no obligation to pay money to any one, except upon the ground that the treaty provides that it shall be done.

The last class grows out of the implied obligation to pay, which the United States assumed when they received the money, and which as against the United States has no existence as a legal claim until after the receipt of the money, and refusal to pay it over to those on whose account it was received. The United States have become bailee for the persons entitled to the money, and are liable for a breach of their implied contract with their bailor in the Court of Claims.

It is true that in the present case the Commissioners at Geneva did not expressly award the money to the insurance companies. But they established the principles on which the liability of Great Britain was ascertained, and these show as plainly that the insurance companies are entitled, as if they had been expressly named in the award. There may be more difficulty in showing this fact than if the companies had been particularly mentioned, but, as already suggested, this affects the question of evidence, not of jurisdiction, with which I am now only dealing.

Ninth. Section 1066 does not affect the right of this company to bring its action in the Court of Claims.

Point XI.

THE BEARING OF THE ACTS OF CONGRESS PASSED IN RELATION TO THE GENEVA AWARD UPON THE RIGHTS AND REMEDY OF THE APPELLANT.

By the Act of March 3, 1873 (17 Statutes at Large, p. 601), Congress provided that immediately upon the payment of the sum of money awarded to the United States by the Tribunal of Arbitration at Geneva to be paid by the government of Great Britain, the same should be paid into the Treasury, and used, so far as may be, to pay the public debt of the United States, and an amount equal to the debt so redeemed should be invested in the five per cent. registered bonds of the United States, subject to the future disposition of Congress.

This act recognised the fact that the United States received this money to be held in trust. It created a trust fund, and put upon it certain ear marks.

By the Act of June 23, 1874 (18 Statutes at Large, 245), Congress, for the purpose of carrying out a distribution and an administration *pro tanto* of the fund, gave a specific remedy. This remedy made certain of the claimants upon said fund preferred distributees. This class embraced all who came within the limits marked out by the Tribunal of Arbitration whose property was destroyed by the three inculpated cruisers, except certain insurance companies who might have been fortunate in their war-risk business. This statute did not deprive underwriters of any rights. It only postponed the hearing of their claims. It did not at that time destroy the trust fund, or convert it to the use of the Government, or cover it into the Treasury, or direct that the balance which might remain after the preferred claims should be given to those who were not entitled to it under the limits marked out by the tribunal, or appropriate it to any other purpose which Congress might declare. It did say to the apellant, "You shall not prove your claim now before this Court if you have been fortunate in business," but it did not directly or indirectly say to the appellant, "You have no rights. We, the United States, own the money." It simply postponed the appellant's time within which to prove his claim.

This act was purely administrative in its character, and was for the purpose of ascertaining certain persons to whom, and the amounts for which they had claims upon the fund by virtue of the destruction of their property, and the payment of the indemnity therefor by Great Britain. That which each one received under this act came to him as a matter of right. The Court of Commissioners of the Alabama Claims, constituted by this act, were directed to make awards, not to those who were not entitled, but to those who had lost property which came within the limits defined by the tribunal, and who have received no indemnity therefor from the underwriters. This act provided a special remedy, and while that special remedy was in existence, even if it did not embrace all who might claim as a matter of right under this administration, it precluded a recourse by the appellant to any other remedy.

Nichols vs. The U. S., 7 Wall., 122.

In accordance with the terms of the Act Secretary Sherman on March 31, 1877, covered into the Treasury the balance which remained after the payment of these preferred claims, and made such balance a part of the general fund of the Government. The trust relation between the United States and this appellant was then at an end, and then our remedy arose.

The Act of June 5, 1882, although in terms it revived the Court of Commissioners established by the Act of 1874, yet its whole scope was entirely different. It proceeded upon the basis that the money covered into the Treasury by Secretary Sherman belonged to the Government, and that the unpaid claimants, the underwriters, whose property was included within the limits marked out by the tribunal, had no right to it. It was practically nothing but an appropriation bill. It took the undistributed money which the underwriters claimed was theirs by virtue of its being an indemnity for their property within the limits marked out by the tribunal, and ordered that it be paid to indemnify (1) those who suffered losses by the exculpated cruisers, and (2) those who paid enhanced or war premiums. Both of these classes were distinctly excluded by the tribunal, and were not within the limits marked out by it as defining the liability of Great Britain and the claims for which she was adjudged to make indemnity.

The appellant claims that the United States received this fund charged with the duty to pay it over to those who were entitled to it, or, in other words, to those for whose losses it had been received as an indemnity. Between the date of the receipt of the money and the Act of 1874, no remedy arose to the appellant cognizable by the Court of Claims, because the money was received under a trust relation, and moreover, in such a case, an action does not lie against a party for not accounting and paying over until after a demand is made.

Topham vs. Bradick, 1 Taunt., 572.
2 Chitty on Contracts, 916.
U. S. vs. Taylor, 104 U. S., 216.

After the special remedy had been worked out, and the conversion took place, a remedy arose to us which was cognizable by the Court of Claims. This remedy was not affected by the Act of June 5th, 1882, (1) because that act was not a distribution which affected us, but an act of appropriation, giving our money to other parties, and (2) because, under the doctrine advanced in the "Twenty per cent. cases" (20 Wall. 179), this Court holds that "Courts of justice agree that no statute, however positive in its terms, is to be construed as designed to interfere with existing contracts, rights of actions, or with vested rights, unless the intention that it should so operate is expressly declared, or is to be necessarily implied."

Point XII.

THE JUDGMENT OF THE COURT BELOW SHOULD BE REVERSED AND THE MOTION TO DISMISS THE APPELLANT'S PETITION DENIED.

JOHN McDONALD,
Attorney for Appellant,
No. 11 Pine Street,
New York.

112-198

Office Supreme Court U. S.
FILED
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JAMES H. McKENNEY,
CLERK

In the Supreme Court of the United States.

OCTOBER TERM, 1884.

THE SOUTHWESTERN INSURANCE COMPANY
vs.
THE UNITED STATES.
No. 835.

PAULISON
vs.
THE UNITED STATES.
No. 836.

BRIEF FOR THE UNITED STATES.

In the Supreme Court of the United States.

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THE SOUTHWESTERN INSURANCE COMPANY
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BRIEF FOR THE UNITED STATES.

These are cases in which the appellants seek to recover out of the money paid by Great Britain to the United States under the *Geneva* award so much as will compensate them for losses paid because of their having insured certain vessels against risks by capture of the Confederate States vessels Alabama and Florida; the theory of the claimants being that by the dealings of the United States with Great Britain in this respect, and their subsequent

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covering of the balance of the award into their Treasury, they are bound by a contract to make such compensation.

Motions were made below to dismiss the claims for want of jurisdiction.

These were granted.

The opinion of the learned court below is relied upon as a sufficient statement of the principles of law upon which the case of the Government should be rested.

The sections of the act of 1874, ch. 459, 18 Stat., 245 ("for the creation of a court for the adjudication and disposition of certain moneys received into the Treasury under an award," &c., by virtue of the treaty of Washington), alluded to in that opinion, so far as material here, are as follows:

> That the President of the United States be, and he is hereby, authorized to nominate and, by and with the advice and consent of the Senate, appoint five suitable persons, who shall constitute a court, to be known as the "Court of Commissioners of Alabama Claims." Each of the judges and other officers of said court shall take the oath of office prescribed by law to be taken by all officers of the United States. The President shall designate, by appointment, one of the said judges to be presiding judge of the court; and all vacancies which may occur in said court by reason of death, resignation, or inability or refusal or neglect of any or either of said judges to discharge the duties of his position shall be filled in the same manner as vacancies occurring in offices under the Constitution of the United States are filled.

SEC. 2. That the said judges shall meet and organize said court in the city of Washington, where the said court shall hold its sittings. Three judges of said court shall constitute a quorum for the transaction of business, and the agreement of three shall be necessary to decide any question arising before said court.

SEC. 3. That the said court be, and it is hereby, authorized to publish notice of its sessions, and to make all needful rules and regulations not contravening the laws of the United States or the provisions of this act, for regulating the forms and mode of procedure before the said court, and for carrying into full and complete effect the provisions of this act. Such rules and mode of procedure shall conform, as far as practicable, to the mode of procedure and practice of the circuit courts of the United States; and the said court is hereby vested with the same powers now possessed by the circuit and district courts of the United States to compel the attendance and testimony of parties, claimants, and witnesses, to preserve order, and to punish for contempts; and in all claims which shall be presented before said court the person or persons prosecuting such claim shall be deemed the complainant and the United States shall be deemed the respondent. And said court shall have power to compel the production of any books or papers deemed material to the consideration of any claim or matter pending therein.

SEC. 11. That it shall be the duty of said court to receive and examine all claims admissible under this act that may be presented to it, directly resulting from damage caused by the so-called insurgent cruisers Alabama, Florida, and their tenders, and also all claims admissible under this act directly resulting from damage caused by the so-called insurgent cruiser Shenandoah after her departure from Melbourne, on the eighteenth day of February, eighteen hundred and sixty-five, and to decide upon the amount and validity of such claims, in conformity with the provisions hereinafter contained, and according to the principles of law and the merits of the several cases. All claims shall be verified by oath of the claimant, and filed in said court within six months next after the organization thereof, as provided in section eight of this act; and no claim shall be received, docketed, or considered that shall have not been so filed within the time aforesaid; but every such unrepresented claim shall be deemed and held to be finally and conclusively waived and barred.

SEC. 14. That the said court shall report to the Secretary of State a list of the several judgments and decisions made by it, a certified copy of which shall, upon the conclusion of the business of the said court, be by him transmitted to the Secretary of the Treasury, who shall thereafter, as soon as may be and upon such notice and in such manner as he shall prescribe, pay the said judgments, together with interest at the rate of four per centum per annum on the amount of such judgments from the date certified, unto the persons, respectively, in whose favor the same shall have been made, or to their respective legal representatives, in full satisfaction and discharge of said judgments: *Provided*, That if the sum of all the judgments rendered by the said court, together with interest, shall exceed the amount received into the Treasury of the United States as proceeds of the sum to be paid by Great Britain, by virtue of the said decision and award, then the Secretary of the Treasury shall distribute, in ratable proportions, among the parties in whose favor judgments shall have been rendered, or to their legal representatives, such moneys as have been received into the Treasury, according to the proportions which their respective judgments shall bear to the whole amount received into the Treasury as aforesaid, which payments shall be in full satisfaction and discharge of such claims and judgments.

SEC. 15. That the Secretary of the Treasury is hereby authorized and required to pay the said respective judgments of said court, out of any such money in the Treasury not otherwise appropriated; and for that purpose he is hereby authorized when necessary to issue and sell at public sale, after ten days' notice of the time and place of sale, at not less than par in coin, a sufficient amount of coupon or registered bonds of the United States, in such form as he may prescribe, of denominations of fifty dollars, or some multiple of that sum, redeemable in coin of the present standard value, at the pleasure of the United States after ten years from the date of their issue, and bearing interest payable quarterly in such coin at the rate of five per centum per annum; and upon the payment, from time to time, of the said respective judgments of said court as before provided, the bonds of the United States mentioned in the act approved March third, eighteen hundred and seventy-three, entitled "An act for the creation of a court for the adjudication and disposition of certain moneys received into the Treasury under an award made by the tribunal of arbitration constituted by virtue of the first article of the treaty concluded at Washington the eighth of May, anno Domini eighteen hundred and seventy-one, between the United States of America and the Queen of Great Britain," shall be canceled and extinguished to the amount of such payments; and when all such payments shall have been made, any such bonds remaining shall be also canceled and extinguished; and after the payment of the said judgments, and the reimbursements of the expenses as herein provided, if there shall remain any part of the said money, the same shall be and remain a fund from which Con-

> gress may hereafter authorize the payment of other claims thereon. And the moneys necessary for the payment of the salaries of the judges and other officers authorized by this act, and of the expenses of the said court as hereinbefore mentioned, are hereby appropriated out of any moneys in the Treasury not otherwise appropriated.

(For the creation of a court," &c.)

[Act of 1873, ch. 261; 17 Stat. 601; referred to in section 15, above.

> That immediately upon the payment of the sum of money awarded to the United States by the tribunal of arbitration at Geneva to be paid by the Government of Great Britain the same shall be paid into the Treasury and used to redeem, so far as it may, the public debt of the United States. And the amount equal to the debt so redeemed shall be invested in the 5 per cent. registered bonds of the United States to be held subject to the future disposition of Congress.]

The material portions of the act of 1882, ch. 185 (22 Stat. 98), "re-establishing the Court of Commissioners of Alabama Claims," are as follows:

> That the Court of Commissioners of Alabama Claims created by chapter four hundred and fifty-nine of the laws of the Forty-third Congress is hereby re-established, in the manner and with the obligations, duties, and powers imposed and conferred by said chapter, except as changed or modified by this act.

SEC. 4. That the practice and proceedings established and directed by said chapter four hundred and fifty-nine shall be followed and had in regard to all claims provable under this act; and it shall be the duty of the said court hereby re-established, in the mode and subject to all the conditions, limitations, and provisions of said chapter four hundred and fifty-nine, except as changed and modified by this act, to receive and examine the claims mentioned in section five of this act and to enter judgments for the amount allowed therefor in two classes.

SEC. 5. That the first class shall be for claims directly resulting from damage done on the high seas by Confederate cruisers during the late rebellion, including vessels and cargoes attacked on the high seas, although the loss or damage occurred within four miles of the shore, excluding claims which have been proved pursuant to section eleven of said chapter four hundred and fifty-nine. The second class shall be for claims for the payment of premiums for war risks, whether paid to corporations, agents, or individuals, after the sailing of any Confederate cruiser.

SEC. 6. That in examining claims in either class it shall be the duty of the court to deduct any sum received by any claimant as an indemnity, dividend, set-off, or otherwise, so that the actual loss of such claimant only shall be allowed.

SEC. 7. That the judgments rendered by said court under this act shall be paid by the Secretary of the Treasury out of the sum of money paid to the United States pursuant to article seven of the treaty of Washington, and accruing therefrom, not appropriated to claims proved under the provisions of said chapter four hundred and fifty-nine, or any act extending the time for the filing of claims thereunder.

SEC. 8. That judgments entered in the first class shall be paid before judgments of the second class are paid. If the sum of money so unappropriated shall be insufficient to pay the judgments of the first class, they shall be paid according to the proportions which they severally bear to the whole amount of such unappropriated sum. If such sum shall be sufficient to pay the judgments of the first class and not sufficient to pay the judgments of the second class, the latter judgments shall be paid according to the proportions which they severally bear to the residue of such unappropriated sum after the judgments entered in the first class are paid.

SEC. 9. That the said court, after all its judgments and decisions have been rendered, shall transmit to the Secretary of State a list of such judgments and decisions, stating the class and amount, with interest at 4 per centum from the time the loss accrued to the thirty-first of March, eighteen hundred and seventy-seven, a certified copy of which shall be by him transmitted to the Secretary of the Treasury, who shall thereafter, as soon as may be, and upon such notice and in such manner as he shall prescribe, pay the said judgments out of any money in the Treasury not otherwise appropriated: *Provided, however*, That such payments shall be made in accordance with the provisions of the preceding sections: *And provided further*, That the whole amount paid out shall not exceed the amount remaining of the Geneva award and interest, as it was when actually covered into the Treasury. And so much money as may be necessary to carry out the provisions of this section is hereby appropriated out of any moneys not otherwise appropriated.

SEC. 10. That all moneys necessary for the payment of the salaries of the judges and officers authorized by section two of this act, and for the lawful expenses of the said court hereby re-established, are

> hereby appropriated out of any moneys in the Treasury not otherwise appropriated; all of which shall be reimbursed out of the said unappropriated moneys before any of the judgments rendered under this act shall be paid. And after the reimbursement of all the expenses authorized by this act, and the payment of all the judgments rendered thereunder, if there shall remain any part of the said money, the same shall be and remain a fund from which Congress may hereafter authorize payment of other claims thereon.

Reading the above statutes as being *in pari materia* with that which constitutes the Court of Claims, it seems to be impossible that the legislature should have intended anything in the latter statute to extend to the general subject-matter treated of in the former, whether such treatment be by words conferring or by words excluding the jurisdiction of the special court thereby created. Evidently Congress when maturing the acts of 1874 and 1882 considered that the duties of the United States in regard to the Alabama fund were merely political.

It seems then that if any substantial doubt could be suggested as to the exact character of the engagements of the United States in respect to that fund, *i. e.*, whether these be merely *political*, or *contractual*—in the ordinary sense of that word, the circumstance that Congress in the course of contemporary legislation has treated it as of the former class is a fatal objection to the jurisdiction (*over contracts*) of a tribunal which exists and is defined entirely at the will of Congress. The conclusion must be that even if the duty of the United States be contractual it is not so in respect of that sort of contracts that has been committed to the Court of Claims.

The case for the United States rests then upon two grounds:

1. That their relation to the claimants is not one of *contract*, as that word is generally taken.

2. That even if it be, it is of a sort that has in effect been excepted by statute from the jurisdiction of the Court of Claims.

In this state of the case it may savor of "excess" to suggest also that the *contract* is one that in case of private parties would require the intervention of a court of equity, and therefore for another reason cannot be heard in the Court of Claims. The general case presented is that of *A fund in which a large number of persons are interested,—a defendant liable only in respect of that fund,—and questions existing* (act of 1882, above) *as to the adequacy of the latter to meet all claims upon it.*

S. F. PHILLIPS,
Solicitor-General.

112-201

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. 1056.

JOHN FOSTER, COUNTY ATTORNEY OF SALINE COUNTY, KANSAS, PLAINTIFF IN ERROR,

vs.

THE STATE OF KANSAS EX REL.; W. A. JOHNSTON, ATTORNEY GENERAL OF THE STATE OF KANSAS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

FILED OCTOBER 11, 1884.

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JUDD & DETWEILER, PRINTERS, WASHINGTON.

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the State of Kansas, Greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea, which is in the said supreme court of the State of Kansas, before you, being the highest court of law and equity of the said State of Kansas in which a decision could be had in the said suit between the State of Kansas upon the relation of W. A. Johnston, attorney general, plaintiff, and John Foster, county attorney of Saline county, Kansas, defendant, wherein was drawn in question the validity of a statute of the said State of Kansas, on the ground of its being repugnant to the Constitution of the United States, and the decision was in favor of such its validity; and wherein was drawn in question the construction of a clause of the Constitution of the United States, being that portion of section
2 one of article fourteen of said Constitution, which reads "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law," and the decision was against the right and privilege set up and claimed under such clause of the Constitution, and which said right and privilege so set up and claimed was the right to a speedy and public trial by an impartial jury, within the county and district wherein the crime was committed; the right to be confronted with witnesses, face to face, and a right to a trial by jury for a criminal offense, according to the rules and due course of law as established within and by the State of Kansas, a manifest error hath happened, to the great damage of the said John
3 Foster, as by his complaint appears:

We being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid, in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and speedily, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the 2nd Monday of October next, in the said Supreme Court to be then and there held, that the record of proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court of the United States of America, on
4 this first day of April, in the year of our Lord one thousand eight hundred and eighty-four.

[SEAL.] A. S. THOMAS,
Clerk of the Circuit Court of the United States
for the District of Kansas.

Allowed, April 5, 1884.
M. R. WAITE, *Chief Justice U. S.*

[Endorsed:] 3093. Filed April 8, 1884. C. J. Brown, clerk sup. court.

5 The United States of America to the State of Kansas on the relation of W. A. Johnston, attorney general of the State of Kansas, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Kansas, wherein John Foster, county attorney of Saline county, Kansas, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

6 Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court of the United States of America, this 5th day of April, in the year of our Lord one thousand eight hundred and eighty-four.

M. R. WAITE,
Chief Justice U. S.

[Endorsed:] 3093. Filed April 8, 1884. C. J. Brown, clerk sup. court.

7 Supreme Court of the United States.

STATE OF KANSAS on the relation of W. A. JOHNSTON, Attorney General of the State of Kansas,

versus

JOHN FOSTER, County Attorney of Saline County, Kansas.

Know all men by these presents, that we, John Foster, P. F. Lindh, and Frank Shaw & Barnard Martin, of the county of Saline, in the State of Kansas, are held and firmly bound unto the State of Kansas in the sum of three thousand dollars, to be paid to the said the State of Kansas; to which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals, dated this 5th day of April, 1884.

8 Whereas the above-named John Foster hath prosecuted a writ of error in the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the supreme court of the State of Kansas:

Now, therefore, the condition of this obligation is such, that if the above-named John Foster shall prosecute his said writ of error to effect, and answer all costs and damages if he shall fail to make good his plea, then this obligation shall be void; otherwise, to remain in full force and virtue.

JOHN FOSTER. [SEAL.]
P. F. LINDH. [SEAL.]
FRANK R. SHAW. [SEAL.]
BERNARD MARTIN. [SEAL.]

Sealed and delivered in presence of—
E. E. BOWEN.

Approved, April 5, 1884.
M. R. WAITE, *Chief Justice, U. S.*

UNITED STATES OF AMERICA,
State of Kansas, County of Saline, } *ss:*

9 P. F. Lindh, Frank Shaw, and Barnard Martin, depose and say, and each for himself, that he is worth the sum of three thousand dollars over and above all his just debts and liabilities.

FRANK R. SHAW.
P. F. LINDH.
BERNARD MARTIN.

Subscribed and sworn to before me, this twenty-second day of March, 1884.

[SEAL.] E. E. BOWEN,
Notary Public.

Term expires Feb'y 14, 1887.

[Endorsed:] 3093. Filed Apr. 8, 1884. C. J. Brown, clerk sup. court.

10 In the Supreme Court of the State of Kansas.

THE STATE OF KANSAS on the relation of W. A. JOHNSTON, Attorney General of the State of Kansas, Plaintiff,
vs.
JOHN FOSTER, Defendant.

Be it remembered that on the 17th day of November, A. D. 1883, there was filed in the office of the supreme court of the State of Kansas a petition in *quo warranto*, which is in the words and figures as follows, to wit:

Petition in Quo Warranto.

11 THE STATE OF KANSAS, *ss:*

In the Supreme Court.

THE STATE OF KANSAS, on the relation of W. A. JOHNSTON, Attorney General, Plaintiff,
vs.
JOHN FOSTER, Defendant.

The State of Kansas on the relation of W. A. Johnston, Attorney General, and by virtue of the authority vested in him by law, gives the court here to understand and be informed that at the general election of the year 1882, and on the 7th day of November, 1882, said defendant, John Foster, was duly elected to the office of county attorney of Saline county, Kansas, for the term of two years, and, having duly qualified, did, on the 8th day of January, 1883, enter upon the discharge of the duties of said office of county attorney, and that ever since said 8th day of January, 1883, said John Foster has been acting as county attorney of said county.

1. That during the time said John Foster was so as aforesaid acting as county attorney of said county, and from the month of January, 1883, continuously to the present time, certain persons, to wit, Charles Holinquist, T. M. Ludes, Gustav Behr, William Sweeney, and others, have been engaged in said county and in the city of Salina, the county seat thereof, in the wilful, open, and notorious sale of intoxicating liquors in violation of law, and especially of the act known as the prohibitory liquor law; that each and all of said persons have kept in said city of Salina and maintained open and public liquor saloons in which were sold various kinds of intoxicating liquors, neither of said persons having or pretending to have any right, permit, or authority to deal in or sell such liquors.

That the fact of such violation of law by said above-named persons was well known by said John Foster from information received by him from others as well as from his own personal observation and experience, he being a frequenter and patron of such illegal saloons during said time; yet the said John Foster, though well knowing that said persons were guilty of violating the provisions of said law known as the prohibitory liquor law, and that it was his duty as such county attorney to prosecute them for such violation, neglected and refused so to do; and by frequenting and patronizing their places of such illegal business did encourage them to continue to violate the law.

2. That on the 8th day of May, 1883, the sheriff of said Saline county, having knowledge of the aforesaid violations of said prohibitory law, gave notice in writing to said defendant, as required by sec. 12 of said law, that said persons above named were selling intoxicating liquors in violation of law, and furnished him with the names of numerous witnesses, all being credible and good citizens of said city of Salina, by whom such illegal sales could be proven; and the said John Foster having inquired into the facts of such alleged violation of said law, knew that the same were true, and well knew from such inquiries as well as from his own personal knowledge and experience, that there was reasonable ground for instituting a prosecution against each of said persons for such violation of law; that said John Foster thereupon, and on the —— day of May, 1883, filed complaints before a justice of the peace against said persons, charging them upon his oath as county attorney with such violation of law,
but did the same corruptly, and not in good faith for the pur-
12 pose of prosecuting and convicting said guilty persons, and
after repeated, voluntary, and inexcusable delays and continuances of all of the cases in which complaints were so filed from the —— day of May, 1883, to the 31st day of August, 1883, said John

Foster not being permitted by the justice of the peace to still further delay and continue said cases without cause, did dismiss each and all of said cases without any just cause or excuse therefor, and well knowing that each of said persons were guilty as charged by him in said complaints, and that such guilt could be proven upon a trial; that the said John Foster, in delaying the prosecution of said cases, and dismissing the same as aforesaid, was corruptly influenced in his duty as county attorney by a desire to shield and protect said guilty persons from the consequences and penalties of their crimes, to the utter disregard of the duties of his office and to the scandal of the administration of justice.

Wherefore, said attorney general, on behalf and in the name of the State of Kansas, prays judgment that the said John Foster, by reason of his aforesaid acts, refusal to act, and misconduct, may be adjudged and declared to have forfeited his said office of county attorney of Saline county, Kansas, and that he be ousted and removed therefrom.

W. A. JOHNSTON,
Att'y General of the State of Kas.
T. F. CARVER,
Of Counsel

Precipe.

The clerk will issue summons in the above entitled cause, directed to the sheriff of Saline county, Kansas, returnable according to law

W. A. JOHNSTON,
Attorney General, State of Kansas.

[Endorsed:] No. 3093. The State *ex rel. vs.* John Foster. Petition. Filed November 17, 1883. C. J. Brown, clerk supreme court.

13 And also on, to wit, the 10th day of January, 1884, there was filed in the office of the clerk of the supreme court of the State of Kansas the plea and answer of defendant, which is in words and figures as follows, to wit:

14 *Plea and Answer.*

In the Supreme Court of Kansas.

THE STATE OF KANSAS on the relation of W. A. JOHNSTON, Attorney General, Plaintiff,
vs.
JOHN FOSTER, County Attorney of Saline County, Defendant.

1. The defendant, for his plea to the petition of the plaintiff herein says he is not guilty as he is in said petition charged.

2. The defendant, for his further answer to the petition of the plaintiff, says, for a second defense, that he denies every allegation contained in the petition not hereinafter expressly admitted.

3. For a third defense, the defendant admits that he has been, and now is, the county attorney of the county of Saline, in the State

of Kansas, as alleged in said petition, but denies every allegation contained in said petition, wherein he is charged, or attempted to be charged, with neglecting to perform, refusing to perform, or corruptly or oppressively performing, any duty legally devolving upon him to perform as the county attorney of Saline county; but, on the contrary, alleges the truth to be, that in the administration of the office of county attorney of Saline county by him, and in the performance of every duty by him arising or growing out of the exercise of said office, he has only been actuated by an honest intention and an honest discretion, and as to every matter, act, and duty to be by him performed as such couny attorney.

4. For a fourth defense, the defendant says that all the offenses, misdemeanors, and official misconduct charged, or attempted to be charged, in the petition against him as the county attorney of Saline county are for the alleged neglect, or refusal to perform, or in corruptly and oppressively performing on his part, as such county attorney, certain alleged and pretended duties attempted to be cast upon him as such county attorney by the following act and pretended law of the State of Kansas, and by no other statute or law of the State of Kansas, that is to say:

15 *Laws taking Effect after Publication.*

(First published February 20, 1881.)

An act to prohibit the manufacture and sale of intoxicating liquors, except for medical, scientific, and mechanical purposes, and to regulate the manufacture and sale thereof for such excepted purposes.

Be it enacted by the Legislature of the State of Kansas:

SECTION 1. Any person or persons who shall manufacture, sell, or barter any spirituous, malt, vinous, fermented, or other intoxicating liquors, shall be guilty of misdemeanor, and punished as hereinafter provided: *Provided, however*, That such liquors may be sold for medical, scientific, and mechanical purposes, as provided in this act.

SEC. 2. It shall be unlawful for any person or persons to sell or barter, for medical, scientific, or mechanical purposes, any malt, vinous, spirituous, fermented, or other intoxicating liquors, without first having procured a druggists' permit therefor from the probate judge of the county wherein such druggist may at the time be doing business; and such probate judge is hereby authorized, in his discretion, to grant a druggists' permit for the period of one year, to any person of good moral character, who is lawfully and in good faith engaged in the business of a druggist in his county, and who, in his judgment, can be intrusted with the responsibility of selling said liquors for the purposes aforesaid, in the manner hereinafter provided. In order to obtain a druggists' permit under this act, the applicant therefor shall present to the probate judge of the county wherein such person is engaged in business, a petition, signed by at least twelve citizens of the township or city wherein such business is located, certifying that the applicant is a person of good moral character, and lawfully engaged in the business of a druggist. He shall also file with such petition a good and sufficient bond to the State of Kansas in the sum of twenty-five hundred dollars, conditioned that such applicant will neither use, sell, barter, nor give away any of the liquors mentioned in section one of this act in violation of any of the provisions of this act; and on such violation, said bond shall thereby become forfeited. Such bond must be signed by the applicant, and by at least two of the persons signing such petition as sureties, and such sureties must jointly or severally justify in writing, under oath, in the sum of five thousand dollars over and above all their debts, legal exemptions, and liabilities: *Provided*, That in cities, towns, and places, of less than five thousand population, said bond may be in the sum of one thousand dollars, and the sureties shall justify as provided above in the sum of two thousand dollars. The probate judge shall consider such petition and bond, and if satisfied that the petition is true, and that the bond is sufficient under this act, may in his discretion grant a permit to the applicant to sell intoxicating liquors for medical, scientific, and mechanical purposes only, and thereupon, before delivering said permit, and before it shall be of any validity, the probate judge shall record upon the journal of his court the said permit, together with his order granting the same, and the bond filed therewith and justification thereon, which said permit shall be posted in a conspicuous place in the store where such business is carried on. The probate judge shall receive for said services the sum of five dollars, to be paid by the applicant.

SEC. 3. Any physician who is regularly engaged in the practice of his profession as a business, and who in cases of actual sickness shall deem any of the liquors mentioned in the first section of this act necessary for the health of his patient, may give such patient a written or printed prescription therefor. But no such prescription shall be made or given except in case of actual sickness, and when, in the judgment of such physician, the use of intoxicating liquor is necessary as a remedy. Whenever, in the treatment of a minor, it shall be necessary to use intoxicating liquor as a remedy, the same shall be procured by his parent or guardian, or some other person of full age, to whom such physician may deliver a prescription for that purpose. Every physician, before making any prescription for intoxicating liquor, shall make and file with the probate judge of the county wherein he may practice his profession an affidavit before some officer of the county authorized to administer oaths, in substance, as follows:

STATE OF KANSAS, }
County of ———, } *ss:*

I, A. B., do solemnly swear that I am a practicing physician of the State of Kansas, residing in the county of ———, in said State, and I do further solemnly swear that I will not prescribe intoxicating liquors of any kind for any person or persons whomsoever, unless in case of actual sickness, and when the same is necessary for the health of the patient: that I will in all things faithfully keep, observe, and perform all the requirements and conditions of the laws of Kansas regulating the sale and use of intoxicating liquors. So help me God.

(Signed) ——— ———.

Sworn to before me, and subscribed in my presence, this — day of ———, A. D. 18—.

And such affidavit shall be renewed and filed at the expiration of each five years of said physician's practice. Every physician, or person assuming to act as such, who shall make a prescription for any intoxicating liquors without having made and filed the affidavit in this section provided, or who shall, after making and filing such affidavit, violate any of the provisions of this act, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not less than one hundred ,dollars nor more than five hundred dollars; and for any second or subsequent offense shall, upon conviction, be subject to the same fine, and in addition thereto shall be imprisoned in the county jail not less than thirty days nor more than six months. No druggist shall sell upon or fill any prescription for intoxicating liquors until the physician making the same shall have made and filed the affidavit in this section provided, and shall not continue such sales for more than five years after such affidavit is filed, unless a new affidavit is filed, as required by this section. The probate judge shall forthwith deliver to each licensed druggist in his county a certificate of the filing of each physician's affidavit, required by this act.

SEC. 4. Any druggist having a permit to sell intoxicating liquors under the provisions of this act may sell for medical purposes only upon the written or printed prescription of a practicing physician, duly signed by such physician, and who has made and filed the affidavit mentioned in the preceding section; and for scientific and mechanical purposes only upon a written or printed application, which shall be dated, and shall set forth the name of the applicant, his residence and occupation, the quantity and kind of liquor required, and the purpose for which it is required, and shall have appended thereto an affidavit by the applicant, made before some officer authorized to administer oaths in his county, that the statements contained in such application are true; and all such applications shall be retained by the druggist selling thereon, and at the end of every thirty days, or sooner, shall be by him filed in the probate court out of which his permit issued, where they shall be safely kept for the period of two years from the date of the filing of each. Every person willfully taking a false oath in making any such application shall be guilty of perjury, and upon conviction therefor in any court having jurisdiction shall be punished as provided by law for perjury in other cases: *Provided, however*, That no sales of intoxicating liquors shall be made by any such druggist, knowingly, to any minor in any case, except upon prescription for medical purposes, as in this act provided. The said druggist shall file away and keep all prescriptions for intoxicating liquors, and prescriptions partly for intoxicating liquors, by him filled, and shall also keep a book in which he shall make a record of all sales of intoxicating liquors by him made, which record shall show the names and residence of all purchasers of such liquors, the kind and quantity sold, the purpose for which sold, the date of such sales, the prices received, and if upon prescription, the name of the physician making the same. The record so kept shall be open to the inspection of the public at all reasonable times during business hours: *Provided*, That any druggist having a permit to sell intoxicating liquors under this act, may sell such liquors in quantities not less than one gallon to any other druggist having a like permit.

SEC. 5. No person shall manufacture or assist in the manufacture of intoxicating liquors in this State except for medical, scientific, and mechanical purposes. Any person or persons desiring to manufacture any of the liquors mentioned in section one of this act for medical, scientific, and mechanical purposes, shall present to the probate judge of the county wherein such business is proposed to be carried on, a petition asking a permit for such purpose, setting forth the name of the applicant, the place where it is desired to carry on such business, and the kind of liquor to be manufactured. Such petition shall have appended thereto a certificate signed by at least twelve citizens of the township or city where such business is sought to be established, certifying that such applicant is a person of good moral character, temperate in his habits, and a proper person to manufacture and sell intoxicating liquors. Such applicant shall file with said petition a bond to the State of Kansas in the sum of ten thousand dollars, conditioned that for any violation of the provisions of this act said bond shall be forfeited. Such bond shall be signed by said applicant or applicants as principal or principals, and by at least three sureties, who shall justify under oath in the sum of seven thousand dollars each, and who shall be of the number signing said petition. The probate judge shall consider such petition and bond, and if satisfied that such petition is true, and that the bond is sufficient, may in his discretion grant a permit to manufacture intoxicating liquors for medical, scientific, and mechanical purposes. The said permit, the order granting the same, and the bond and justification thereon, shall be forthwith recorded by said probate judge in the same manner and with like effect as in case of a permit to sell such liquors as provided in section two of this act; and the probate judge shall be entitled to the same fee for his services, to be paid by the applicant. Such manufacturer shall keep a book, wherein shall be entered a complete record of the liquors manufactured by him, the sales made, with the dates thereof, the name and residence of the purchaser, the kind and quantity of liquors sold, and the price received or charged therefor. An abstract of such record, verified by the affidavit of the manufacturer, shall be filed quarterly in said probate court at the end of each quarter during the period covered by such permit. Such manufacturer shall sell the liquor so manufactured only for medical, scientific, and mechanical purposes, and only in original packages. He shall not sell said liquors for medical purposes except to druggists who at the time of such sale shall be duly authorized to sell intoxicating liquors as provided in this act; and he shall sell such liquors to no other person, or persons, associations, or corporations, except for scientific and mechanical purposes, and then only in quantities not less than five gallons.

SEC. 6. All sales made by such manufacturer shall be upon a written or printed application, setting forth the name, occupation, and residence of the applicant, the quantity and kind of liquors wanted, and for what purpose; and all such application shall be verified by the affidavit of the applicant, made before some officers in the county having authority to administer oaths, that the statements in said application are true. Such manufacturer shall file all such applications in the probate court of the county wherein the applicant resides, within thirty days after receiving the same, where they shall be kept on file for two years from the date of such filing. Every person who shall willfully swear falsely in making any of the affidavits in this section and in section five of this act provided shall be deemed guilty of perjury, and shall be prosecuted and punished therefor as in other cases arising under the laws of this State relating to perjury. Any rectification or adulteration of intoxicating liquors shall be considered manufacturing under this act. The record kept by such manufacturer shall be open to the inspection of the public at all reasonable times during business hours.

16 SEC. 7. Any person, without taking out and having a permit to sell intoxicating liquors, as provided in this act, who shall, directly or indirectly, sell or barter any spirituous, malt, vinous, fermented or other intoxicating liquor, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined in any sum not less than one hundred dollars, nor more than five hundred dollars, or be imprisoned in the county jail not less than thirty days nor more than ninety days; and for a second offense shall be fined in any sum not less than two hundred dollars, nor more than five hundred dollars, or be imprisoned in the county jail not less than sixty days, nor more than six months; and for a third and every subsequent offense shall be fined in a sum not less than five hundred dollars nor more than one thousand dollars, or be imprisoned in the county jail not less than three months nor more than one year, or shall suffer both such fine and imprisonment, in the discretion of the court.

SEC. 8. Any person, without taking out and having a permit to manufacture intoxicating liquors, as provided in this act, who shall manufacture, or aid, assist, or abet in the manufacture of any liquors mentioned in section one of this act, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall suffer the same punishment as provided in the last preceding section of this act for unlawfully selling such liquors.

SEC 9. Every person having a permit to sell intoxicating liquors, or to manufacture and sell intoxicating liquors under the provisions of this act, who shall sell or barter such liquor in any other manner or for any other purpose than in this act provided, or who shall violate any of the provisions of this act, shall, upon conviction thereof, be deemed guilty of a misdemeanor, and shall be fined in any sum not less than one hundred dollars nor more than three hundred dollars for the first offense, or be imprisoned in the county jail not less than thirty days nor more than ninety days, and in addition thereto shall forfeit his permit to sell under this act; for a second offense he shall be fined in a sum not less than three hundred dollars nor more than five hundred dollars, or shall be imprisoned in the county jail not less than thirty days nor more than ninety days, and forfeit his permit, and for a period of five years his right to obtain a permit to sell intoxicating liquors under this act; and for a third and every subsequent offense he shall be fined in a sum not less than five hundred dollars nor more than one thousand dollars, or shall be imprisoned in the county jail not less than three months nor more than one year, and shall forfeit his permit and his right forever to obtain a permit to sell intoxicating liquors in this State under the provisions of this act. In all cases where forfeitures are provided in this act, the court, in rendering judgment in the action, shall declare such forfeiture in fixing the punishment.

SEC. 10. All liquors mentioned in section one of this act, and all other liquors or mixtures thereof, by whatever name called, that will produce intoxication, shall be considered and held to be intoxicating liquors within the meaning of this act.

SEC. 11. A permit to sell intoxicating liquor under this act shall continue in force for one year from the date hereof, unless sooner forfeited under the provisions of this act; and a permit to manufacture and sell intoxicating liquor under this act shall continue in force for a period of five years from the date thereof, unless sooner forfeited under the provisions of this act: *Provided*, That the probate judge may require a renewal of the bond of said manufacturer at the end of any year by giving thirty days' notice to the principal in such bond, requiring him to renew such bond, and in default of his giving a new bond with sureties, to the satisfaction of such probate judge, after having been so notified, he shall forfeit his permit to manufacture and sell intoxicating liquors under this act; such forfeiture shall be declared by such probate judge, and entered of record in said probate court.

SEC. 12. It shall be the duty of all sheriffs, under-sheriffs, deputy sheriffs, constables, marshals, and police officers of cities or towns, having any notice or knowledge of any violation of the provisions of this act, to notify the county attorney of the county of the fact of such violation, with the name of any witnesses within his knowledge by whom such violation can be proven. If any such officer shall fail in any case to comply with the provisions of this section, he shall, on conviction thereof, be adjudged guilty of a misdemeanor, and fined in any sum not exceeding one hundred dollars, and such conviction shall be deemed a removal of such officer from office. If the county attorney of any county shall be notified by any officer or other persons of any violation of any of the provisions of this act, it shall be his duty forthwith to diligently inquire into the facts of such violation, and if there is reasonable ground for instituting a prosecution, it shall be the duty of such county attorney to file a complaint in writing before some court of competent jurisdiction, charging the suspected person of such offense, and shall verify such complaint by affidavit, but it shall be sufficient to state in such affidavit that he believes the facts stated in such complaint to be true. If any county attorney shall fail or refuse to faithfully perform any duty imposed upon him by this act, he shall be deemed guilty of a misdemeanor, and, on conviction thereof in the district court, shall be fined in any sum not exaceding five hundred dollars, and on such conviction shall be deemed to be removed from office. If in any prosecution begun by the county attorney under the provisions of this section there shall be a failure to convict, the proper costs of such prosecution shall be paid by the county in which such prosecution was begun. It shall be the duty of the county attorney, under penalty of forfeiture of his office, to prosecute any and all persons guilty of any violations of the provisions of this act, and for each successful prosecution he shall be allowed a fee of fifteen dollars, which shall be taxed as costs in the case, but the county shall in no case be liable therefor. The county attorney shall bring suit upon all bonds forfeited under the provisions of this act, immediately upon the happening of such forfeiture, to recover the penalty thereof; and all moneys collected thereon shall be paid into the school fund of the proper county. The county attorney shall be allowed a fee of ten per cent. upon all moneys so collected by him, to be paid out of the same.

SEC. 13. All places where intoxicating liquors are manufactured, sold, bartered, or given away in violation of any of the provisions of this act, or where intoxicating liquors are kept for sale, barter, or use, in violation of this act, are hereby declared to be common nuisances; and upon the judgment of any court having jurisdiction, finding such place to be a nuisance under this section, the sheriff, his deputy, or under-sheriff, or any constable of the proper county, or marshal of any city where the same is located, shall be directed to shut up and abate such place, and the owner or keeper thereof shall, upon conviction, be adjudged guilty of maintaining a common nuisance, and shall be punished by a fine of not less than one hundred dollars nor more than five hundred dollars, or by imprisonment in the county jail not less than sixty days nor more than ninety days, or both by such fine and imprisonment.

SEC. 14. Every person who shall, by the sale, barter, or gift of intoxicating liquors, cause the intoxication of any other person or persons, shall be liable for, and compelled to pay, a reasonable compensation to any person who may take charge of and provide for such intoxicated person, and five dollars per day in addition thereto for every day such intoxicated person shall be kept in consequence of such intoxication, to be recovered by civil action in any court having jurisdiction.

SEC. 15. Every wife, child, parent, guardian, or employer, or other person, who shall be injured in person or property, or means of support, by any intoxicated person, or in consequence of intoxication, habitual or otherwise, or of any person, such wife, child, parent, or guardian shall have a right of action, in his or her own name, against any person who shall, by selling, bartering, or giving intoxicating liquors, have caused the intoxication of such person, for all damages actually sustained, as well as for exemplary damages; and a married woman shall have the right to bring suits, prosecute and control the same, and the amount recovered, the same as if unmarried; and all damages recovered by a minor under this act shall be paid either to such minor, or to his or her parents, guardian, or next friend, as the court shall direct; and all suits for damages under this act shall be by civil action in any of the courts of this State having jurisdiction thereof.

SEC. 16. Every person who shall, directly or indirectly, keep or maintain, by himself, or by associating or combining with others, or who shall in any manner aid, assist, or abet in keeping or maintaining any club room or other place in which any intoxicating liquor is received or kept for the purpose of use, gift, barter, or sale as a beverage, or for distribution or division among the members of any club or association by any means whatever; and every person who shall use, barter, sell, or give away, or assist or abet another in bartering, selling, or giving away any intoxicating liquors so received or kept, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine of not less than one hundred dollars nor more than five hundred dollars, or by imprisonment in the county jail not less than thirty days nor more than six months.

SEC. 17. The giving away of intoxicating liquor, or any shifts or device to evade the provisions of this act, shall be deemed an unlawful selling within the provisions of this act.

SEC. 18. All fines and costs assessed against any person or persons for any violation of this act shall be a lien upon the real estate of such person or persons until paid; and in case any person or persons shall let or lease any building or premises, and shall knowingly suffer the same to be used and occupied for the sale of intoxicating liquor, contrary to the provisions of this act, the premises so leased and occupied shall be subject to a lien for and may be sold to pay all fines and costs assessed against any such occupant for any violation of this act; and such liens may be enforced by civil action in any court having jurisdiction: *Provided*, That the person against whom such fines and costs are assessed shall be committed to the jail of the county until such fines and costs are paid.

SEC. 19. It shall be unlawful for any person to get intoxicated, and every person found in a state of intoxication shall, upon conviction thereof, before any justice of the peace, be fined in the sum of five dollars, or be imprisoned in the county jail not exceeding ten days.

SEC. 20. Whenever application is made to the probate judge for a permit to manufacture or to sell intoxicating liquors, under the provisions of this act, he shall notify the county attorney thereof, and thereupon such county attorney shall appear and advise with said probate judge with reference to the issuance of said permit, and the approval of the bond. No person who shall inform of offenses under this act, or make complaint therefor, shall be liable for the costs incurred in such prosecution, unless the court or jury trying the case shall find and determine that such prosecution was malicious and without probable cause.

SEC. 21. In all prosecutions under this act, by indictment or otherwise, it shall not be necessary to state the kind of liquor manufactured or sold, but shall be necessary to describe the place where sold, and it shall not be necessary to state the name of the person to whom sold; and in all cases the person or persons to whom such intoxicating liquors shall be sold in violation of this act shall be competent witnesses to prove such fact, or any other fact tending thereto. And the members, shareholders, or associates in any club or association mentioned in section sixteen of this act shall be a competent witness to prove any violation of the provisions of said section, or of this act, or of any fact tending thereto.

SEC. 22. It shall be, and is hereby, made the duty of all courts of this State before whom a grand jury is summoned, to charge such grand jury especially concerning this act, and direct said jury to inquire particularly of all violations of any of its provisions.

SEC. 23. Chapter 35 of the General Statutes of 1868, and all acts and parts of acts in conflict with this act, are hereby repealed.

SEC. 24. This act shall be immediately published in the official State paper, and take effect and be in force from and after the first day of May, A. D. 1881.

Approved February 19, 1881.

17 And the defendant avers that the said act and pretended law of the State of Kansas is contrary to and against the Constitution of the United States of America, and the laws passed in pursuance of said Constitution and at all times heretofore and now in force; that the said act and pretended law is, for the foregoing cause, null and void; and that no legal duty or requirement was, or is, cast upon the defendant as such county attorney by its terms or provisions.

Wherefore, the defendant asks that all the matters of defense hereinbefore stated may be inquired of and heard according to the law of the land; that he may have a jury trial, and upon a final hearing may be discharged and have judgment for his costs.

T. P. FENLON,
C. A. HILLER, AND
WATERS & ENSMINGER,
Attorneys for Defendant.

[Endorsed:] No. 3093. Filed Jan. 10, 1884.

18 And afterwards, on, to wit, the 7th day of March, A. D. 1884, the same being one of the regular judicial days of the January term, A. D. 1884, of the supreme court of the State of Kansas, before said court, in session at the supreme court-room in the city of Topeka—present, the Hon. A. H. Horton, chief justice; D. M. Valentine and D. J. Brewer, associate justice, and C. J. Brown, clerk—the following proceeding, among others, was had and entered of record, as follows, to wit:

THE STATE OF KANSAS *ex rel.*, Plaintiff, *vs.* JOHN FOSTER, Defendant.

At two o'clock p. m. of this 7th day of March, A. D. 1884, this cause came on for further hearing, and thereupon the introduction of testimony by both parties was concluded, and thereupon the court instructed the jury in the law governing the case; and after oral argument by R. A. Lovitt, E. A. Austin, and T. F. Garver, attorneys for plaintiff, and J. G. Waters and T. P. Fenlon, attorneys for defendant, the cause was submitted to the jury. The jury retired in charge of the custody of a sworn bailiff of this court, and, after due deliberation thereon, agreed upon the following verdict, and returned the same into court:

Verdict.

"THE STATE OF KANSAS on the relation of the Attorney General of the State of Kansas, Plaintiff,
vs.
JOHN FOSTER, Defendant.

We, the jury in this case, find for the plaintiff.
ALFRED PRATT, *Foreman.*"

Whereupon the jury is discharged from the further consideration of the case, and the defendant gave notice of a motion for a new trial.

19 And afterwards, on the 10th day of March, A. D. 1884, there was filed in the office of the clerk of the supreme court of the State of Kansas a motion for a new trial in the above-entitled cause, which is in the words and figures as follows, to wit:

20 *Motion for a New Trial.*

In the Supreme Court of the State of Kansas.

THE STATE OF KANSAS on the relation of W. A. JOHNSTON, Attorney General, Plaintiff,
versus
JOHN FOSTER, County Attorney of Saline County, Defendant.

The defendant in above-entitled action moves the court to vacate and set aside the verdict of the jury, and to grant him a new trial for each and all of the following causes affecting materially the substantial rights of the defendant, that is to say:

1. Irregularity in the proceedings of the court, by which the defendant was prevented from having a fair trial.
2. Irregularity in the orders of the court directing the impaneling of the jury and the taking of testimony, by which the defendant was prevented from having a fair trial.
3. That the orders of the court in striking out certain evidence for the defendant, taken by the commissioner, were erroneous.
4. That the court erred in not admitting evidence of the defendant's good character and professional reputation.

5. That the court erred in refusing to sustain the defendant's motion to strike out certain evidence for the State taken by the commissioner.

6. Misconduct of the jury.

7. Misconduct of the prevailing party and the counsel of the State.

8. Accident which ordinary prudence could not have guarded against.

9. Surprise which ordinary prudence could not have guarded against.

10. That the verdict of the jury is not sustained by sufficient evidence.

11. That the verdict of the jury is contrary to law.

12. That the above action is a criminal action, and that the defendant has been denied a trial according to the known rule and course of the law; that he has been denied a speedy public trial by an impartial jury of the county and district in which the offense is alleged to have been committed; that he has been denied a jury trial; that he has been denied challenges guaranteed to all persons charged with offenses by the Constitution and laws of the United States and the State of Kansas.

13. That he has been tried for alleged offenses under a statute of Kansas, particularly set forth in the fourth answer of defendant herein, which is repugnant to, and contrary to, the Constitution and laws of the United States, and is void.

14. That the jury has received evidence papers and documents not authorized by the court.

15. That the court has admitted illegal testimony.

16. That the jury have been guilty of misconduct tending to prevent a fair and due consideration of the case.

17. That the verdict has been decided by means other than by a fair expression of opinion on the part of all the jurors.

18. That the court has misdirected the jury as a material matter of law, and refused to give instructions asked by defendant.

19. That the charges of the court was calculated to and did mislead the jury.

20. That the court failed to instruct the jury of the defendant's
defense, and failed in any manner to bring to the attention of the
jury that the defendant had made or set up any answer to the
21 petition of the plaintiff, although the court had been requested
to instruct generally upon the law of the case by the defendant.

21. Newly discovered evidence, material for the defendant, which he could not, with reasonable diligence, have discovered and procured at the trial.

22. That the court had no jurisdiction of the action.

23. That this action and the course of trial had herein has been in defiance of the rights of the defendant given and guaranteed him by the Constitution and laws of the United States.

24. Error of law occurring at the trial, and excepted to by the defendant, the party making this application for a new trial.

The plaintiff and its attorneys will take notice that on the hearing of this motion affidavits and other evidence will be used and heard on the part of the defendant.

THOMAS P. FENLON,
C. A. HILLER, AND
WATERS & ENSMINGER,
Att'ys for Def't.

(Endorsed:) Filed March 10, 1884. C. J. Brown, clerk supreme court.

22 And thereafter, on, to wit, the first day of April, A. D. 1884, the same being one of the regular judicial days of the supreme court of the January term, 1884, before said court, in session at the supreme court room in the city of Topeka, Kansas—present, the Hon. A. H. Horton, chief justice, and D. M. Valentine and D. J. Brewer, associate justices, and C. J. Brown, clerk—the following proceeding, among others, was had and entered of record, as follows, to wit:

THE STATE OF KANSAS *ex rel.*, Plaintiff,
vs.
JOHN FOSTER, Defendant.

Comes now said plaintiff, The State of Kansas, by W. A. Johnston, attorney general of said State of Kansas, and by T. F. Garver, R. A. Lovitt, and Edwin A. Austin, of counsel for said plaintiff; and comes, also, said defendant in person and by T. P. Fenlon, J. G. Waters, and C. A. Hiller, his attorneys; and said cause coming on to be further heard upon the defendant's motion for a new trial of said cause, and the court, being fully advised in the premises, doth overrule said motion, filing its written reasons and opinion therefor; which ruling of the court the defendant at the time excepted to; and thereupon it is ordered, adjudged, and decreed by the court that said defendant, John Foster, forfeit the office of county attorney of Saline County, State of Kansas, and that said John Foster, defendant herein, be, and he hereby is, ousted and excluded from said office and the powers, privileges, and emoluments thereof, and that said defendant pay the costs of this suit, to be taxed; to which judgment of the court the defendant at the time excepted.

23 And thereupon came the defendant and presented to the court his bill of exceptions, which was by the court settled, allowed, and signed as a true bill of exceptions in said case, and it was ordered to be filed by the clerk of this court as a part of the record in this case; which said bill of exceptions is in the words and figures as follows, to wit:

24

Bill of Exceptions.

In the Supreme Court of the State of Kansas.

THE STATE OF KANSAS on the relation of W. A. JOHNSTON, Attorney General, Plaintiff,

vs.

JOHN FOSTER, County Attorney of the County of Saline, Defendant.

Be it remembered that in the above-entitled action, on the first appearance of the defendant therein and at the proper time, the defendant, as to and upon the charge alleged against him in the petition filed in the above action, demanded of the supreme court of the State of Kansas that he be tried in the county of Saline, in the State of Kansas; that he demanded the selection and empanelling of a jury drawn and chosen from Saline county, with the right to four peremptory challenges; that he demanded the right of compulsory process for his witnesses and to meet them face to face; that he demanded the right to introduce evidence of good professional character and reputation, which evidence he had ready before the court to produce and use upon the trial; that he demanded the right to the reasonable doubt on the consideration of the evidence by the jury in the determination of their verdict. The defendant then and there claimed under all of said demands that it was a criminal charge which was alleged against him in the petition, and he insisted that the rights, privileges, and immunities which he claimed from the court were given him as a citizen of the State of Kansas, and especially as a citizen of the United States, under the Constitution of the United States; that the supreme court of the State of Kansas refused to dismiss the action and retained jurisdiction of the same; that it decided that the petition alleged a civil action only against the defendant; that it was a civil action, and not a criminal action; refused to permit or direct his trial to be held in Saline county; refused to permit the case to be tried there; that said court held the same for trial as a civil action and completed the action as such; that the defendant was refused a jury from Saline county, but a jury was allowed the defendant under the following order of the court made concerning the summoning of a jury and the taking of testimony, and entered of record Feb. 8, 1884, viz:

"THE STATE OF KANSAS *ex rel.*, Plaintiff,

vs.

JOHN FOSTER, Defendant.

"Now came on for decision the motion of defendant herein, asking for a jury trial of this cause, and thereupon it is ordered that said motion be allowed and a jury trial granted *ex gratia.* It is further ordered that Chester Thomas, Jr., of Shawnee county, Kansas, be, and he is hereby, appointed special marshal of this court in this case, to be in attendance upon the court during the trial, to serve all writs issued to him, and to execute the orders of this court; and it is fur-

ther ordered that the clerk shall issue a *venire facias*, directed to the special marshal, commanding him to summons from the State at large twenty-four jurors having the qualifications of electors, to appear before this court for the trial of this cause on Thursday, March 6, 1884, at 10 o'clock a. m. The *venire* shall be served and returned on or before the day therein named for the appearance of the jurors, and the return of the special marshal shall contain a list of the names of the jurors summoned. It is further ordered that the clerk
shall, at the request of the parties, issue subpœnas for wit-
25 nesses to appear and testify before this court, but no more
than four witnesses shall be subpœnaed to testify on behalf
of each party. It is further ordered that N. H. Loomis, of Saline county, Kansas, be, and he is hereby, appointed a commissioner of this court to take testimony in this cause. The said commissioner is hereby authorized and empowered to issue subpœnas for witnesses to appear before him, to issue process and compel the attendance of witnesses, and to hear and record the testimony, and is required to forthwith file his oath of office in the office of the clerk of this court, to proceed at once to the performance of the duties of his office, and on or before the first day of March, 1884, to file in the office of the clerk of this court his report of the testimony so taken; and it is further ordered that all motions to suppress testimony or concerning matters of practice in this case are assigned for hearing and argument on Tuesday, March 4, 1884, at 10 o'clock a. m."

The defendant was allowed only three peremptory challenges; that he was refused compulsory process for his witnesses; that he was refused the right to meet his witnesses face to face, and depositions of absent witnesses were read upon the trial over the objection of defendant; that upon his offer to introduce to the jury evidence of his good professional character and reputation on the trial it was refused by the court; that after all of the evidence in the case had been presented to the jury the court instructed and charged the jury, in writing, as follows:

26 GENTLEMEN OF THE JURY:

The defendant, John Foster, on the 8th day of January, 1883, entered upon the discharge of the duties of the office of county attorney of Saline county, in this State, and has ever since been, and now is, the county attorney of that county. This action, in which you are impanelled as jurors, has been brought in this court by the State of Kansas on the relation of W. A. Johnston, the attorney general, to remove him from that office. The statute provides when any county attorney shall neglect or refuse to perform any act which it is his duty to perform, or shall corruptly or oppressively perform any such duty, he shall forfeit his office, and shall be removed therefrom by civil action. This case, therefore, is not a criminal proceeding, and this action is not brought to punish the defendant criminally, but to vacate an office which the State alleges he has forfeited by a failure to discharge its duties.

The consequences of a finding or verdict against him reach to the possession of the office and its emoluments. The statute relating to county officers prescribes, among other things, "That it shall be the duty of the county attorney to appear in the several courts of their respective counties, and prosecute or defend, on behalf of the people, all suits, applications, or motions, civil or criminal, arising under the laws of the State, in which the State or county is a party or interested." The act prohibiting the manufacture and sale of intoxicating liquors, adopted by the Legislature of 1881, prescribes "That it shall be the duty of sheriffs, under-sheriffs, deputy sheriffs, constables, marshals, and police officers of cities or towns, for any notice or knowledge of any violation of the provisions of that act, to notify the county attorney of the fact of such violation, with the names of any witnesses within his knowledge by whom such violation can be proved. * * * If the county attorney of any county shall be notified by any officer or other person of any violation of any of the provisions of that act, it shall be his duty forthwith to diligently inquire into the facts of such violation, and if there is reasonable grounds for instituting prosecutions it shall be the duty of such county attorney to file a complaint, in writing, before some court of competent jurisdiction, charging the suspected person of such offense, and shall verify such complaint by affidavit." The provisions of that act further require county attorneys to comply therewith, to faithfully perform all the duties imposed by the act, and to prosecute any and all persons guilty of any violations of its provisions.

Now, it is charged in the petition in this case that during the time the defendant, John Foster, was acting as county attorney of the county of Saline, and from the month of January, 1883, continuously to the commencement of this action, which was on November 17, 1883, certain persons, to wit: Charles Holinquist, T. M. Ludes, Gustav Behr, and William Sweeney, have been engaged in the county and city of Saline in the wilful, open, and notorious sale of intoxicating liquors, in violation of the laws of the State; that the fact of such violations of law was well known by John Foster from information received by him from others; that it was his duty as such county attorney to prosecute them for such violations, but that he neglected and refused so to do.

It is further alleged in the petition that on the 8th of May, 1883, the sheriff of Saline county, having knowledge of violations of the provisions of the act known as the prohibitory liquor law, gave notice, in writing, to the defendant, as required by sec. 12 of that law, that said persons named were selling intoxicating liquors in violation of law, with the names of the witnesses within his
27 knowledge by whom such violation could be proved; that the
defendant, John Foster, having knowledge that there was reasonable ground for instituting prosecutions against such persons for violations of the prohibitory law, did, on the —— day of May, 1883, file complaints before a justice of the peace in Saline county against all of said persons, charging them, upon his oath as county attorney, with violations of the prohibitory law. The petition states, however, that this was not done in good faith for the purpose of pros-

ecuting and convicting the guilty persons, but that, after repeated, voluntary, and inexcusable delays, and a continuance of all the cases in which complaints were so filed, from the 14th day of May, 1883, to the 1st day of September, 1883, he dismissed each and all of the cases without any just cause or excuse therefor, well knowing that each of said persons were guilty as charged by him in the complaints, and that such guilt could be proved upon a trial. The petition still further charges that the said defendant, John Foster, in delaying the prosecution of the cases, and in dismissing the same, was corruptly influenced in his duty as county attorney by a desire to shield and protect the guilty persons from the consequences and penalties of their crimes. It is admitted in this case that the parties named in the petition were continuously engaged in the wilful and public sale of intoxicating liquors in violation of law at the time therein stated; that complaints were filed against them by the defendant for such violations of law, and that on August 31, 1883, all of the cases against such parties were dismissed. Evidence has been introduced before you tending to prove the various continuances of the cases commenced by the defendant and the proceedings attending their dismissal.

The defendant, as county attorney of Saline county, had the discretionary power, within certain limits, in instituting and prosecuting criminal actions in his county, and if he honestly exercised that discretion, either in bringing the same or failing to bring the same, or in the conduct and disposition of such cases after they were brought, he cannot be removed from his office in this action. We charge you, however, that after he was notified by the sheriff of Saline county of the violations of the prohibitory law by the parties named in such notice, with the names of the witnesses by whom such violations could be proved, it was his duty forthwith to diligently inquire into the facts of such violations, and if there was reasonable ground for instituting the prosecutions, it was his duty not only to file his complaints in good faith before a justice, but it was also his duty to prosecute in good faith the persons therein named for violations of the provisions of the act, if he had reasonable ground to believe them to be guilty.

In this connection we may say to you that the reasons filed by the defendant on Sept. 1, 1883, with the justice before whom the actions had been brought furnished no excuse or justification for the defendant to dismiss the cases in which he had filed complaints. A county attorney cannot consult or be controlled by the wish or sentiment of the people of his county in the prosecution of the violators of any law. A county is a political division of a State, and the county attorney is, within his county, a representative of the State. After he has commenced prosecutions under the prohibitory act against parties guilty of the violation of the provisions of that law, and has been furnished with the names of the witnesses by whom such violations can be proved, he is not to be deterred from his duty by mere public clamor. He is to look to the statute prescribing his duties and powers as the chart for his direction and guidance, and he must comply with all that it demands at the hands of its officers.

28 Again, if the county attorney was served by the sheriff with the notice introduced in the evidence, he had no right to refuse to prosecute the cases commenced by him merely because no one voluntarily offered himself as prosecuting witness, and he had no authority to dismiss the cases commenced by him because some person had not come forward and signed and sworn to the complaints. There has been evidence introduced in this case tending to prove the defendant visited the various saloons kept and operated by the parties mentioned in the petition, and, from his own observations and experience, knew all the persons charged were guilty of violations of the provisions of the prohibitory act.

Evidence has also been introduced tending to prove no prosecutions were commenced by the defendant against any of the parties selling intoxicating liquors in Saline county in violation of law, and also evidence has been offered tending to prove the saloons were run and operated in that county openly and publicly. This character of evidence has been admitted to show the motives of the defendant, but not for the purpose to have you understand that it was his duty, upon his own knowledge, to commence prosecutions or file complaints.

It is charged in the petition, as before stated, that the county attorney, in dismissing the cases commenced by him, was corruptly influenced in his duty as county attorney by a desire to shield and protect the guilty persons from the consequences and penalty of their acts. To establish these allegations it is not necessary for the State to show that the defendant was bribed with money or anything else to dismiss the cases. No actual corruptions by bribery need be established. If he was influenced to dismiss the cases by a desire to shield and protect the persons against whom he had filed his complaints from punishment for their acts, your verdict should be for the State.

If you find, from the evidence, that the defendant dismissed the cases because at the time of such dismissal he had made up his mind not to prosecute the violators of the prohibitory law in his county, the State is entitled to a verdict.

So, also, if the defendant, at the time of the dismissal, had deliberately resolved not to enforce the prohibitory act in his county, and filed his motion for dismissal of the cases for that reason, the State is entitled to a verdict against him. A county attorney who wilfully, intentionally, and deliberately neglects or refuses to perform any act imposed upon a county attorney by the prohibitory act, or any other statute, is not entitled to continue in his office, if proper proceedings are commenced against him, and such wilful, intentional, and deliberate neglect or refusal be established. If a county attorney is unwilling to perform the duties imposed upon him by any statute, he should voluntarily retire from his office.

On the other hand, if, after a consideration of all the evidence in this case, you shall find that the defendant, in the exercise of a fair and just discretion, and acting in good faith, dismissed the cases commenced by him for reasonable cause, the verdict must be in his behalf. In fact, the main question in this case is, whether the defendant acted in good faith, in the discharge of his duties as county attorney, in the cases named in the petition. If he did not, your verdict must be against him. If he faithfully and properly discharged his duties, the verdict must be for him. The law presumes an officer performs his duty, and in this case the burden of the proof is upon the State.

In a criminal case, when there is reasonable doubt whether the guilt of the defendant is satisfactorily shown, it is the duty of 29 the jury to acquit; but, as before stated, this is not a criminal action, and you are therefore to be controlled and governed, in arriving at a verdict, by the preponderance of the evidence. You are the exclusive judges of all the facts in the case, and are also to pass upon the credibility of the witnesses introduced and the weight of the evidence presented.

We declare to you that the sections of the statute to which we have referred are constitutional and valid, and with the policy or wisdom of the statute you have, as jurors in this case, nothing to do. You accept the law as expounded to you by the court.

Two forms of verdict will be handed you, one for the plaintiff and one for the defendant. When you have agreed upon your verdict you will return to this room and present the same to the court.

30 To each and all of which refusals and decisions of the court in denying the demands of the defendant, the defendant then and there severally and separately and at the proper time excepted, and to the instructions and charge of the court and to each and all of them and to every one of them the defendant severally and separately and properly excepted.

10. That a verdict was returned for the plaintiff in the following words:

Verdict.

THE STATE OF KANSAS, on the relation of the Attorney General of the State of Kansas, Plaintiff,

vs.

JOHN FOSTER, Defendant.

We, the jury in this case, find for the plaintiff.

ALFRED PRATT, *Foreman.*"

That afterwards, and on the 10th day of March, 1884, and within the proper time allowed by law, the defendant filed his motion for a new trial, copy of which is as follows:

31

Motion for a New Trial.

In the Supreme Court of the State of Kansas.

THE STATE OF KANSAS on the relation of W. A. JOHNSTON, Attorney General, Plaintiff,

versus

JOHN FOSTER, County Attorney of Saline County, Defendant.

The defendant in above-entitled action moves the court to vacate and set aside the verdict of the jury, and to grant him a new trial for each and all of the following causes, affecting materially the substantial rights of the defendant, that is to say:

1. Irregularity in the proceedings of the court, by which the defendant was prevented from having a fair trial.
2. Irregularity in the orders of the court directing the impaneling of the jury and the taking of testimony, by which the defendant was prevented from having a fair trial.
3. That the orders of the court in striking out certain evidence for the defendant, taken by the commissioner, were erroneous.
4. That the court erred in not admitting evidence of the defendant's good character and professional reputation.
5. That the court erred in refusing to sustain the defendant's motion to strike out certain evidence for the State taken by the commissioner.
6. Misconduct of the jury.
7. Misconduct of the prevailing party and the counsel of the State.
8. Accident which ordinary prudence could not have guarded against.
9. Surprise which ordinary prudence could not have guarded against.
10. That the verdict of the jury is not sustained by sufficient evidence.
11. That the verdict of the jury is contrary to law.
12. That the above action is a criminal action, and that the defendant has been denied a trial according to the known rule and course of the law; that he has been denied a speedy public trial by an impartial jury of the county and district in which the offense is alleged to have been committed; that he has been denied a jury trial; that he has been denied challenges guaranteed to all persons charged with offenses by the Constitution and laws of the United States and the State of Kansas.
13. That he has been tried for alleged offenses under a statute of Kansas, particularly set forth in the fourth answer of defendant herein, which is repugnant to and contrary to the Constitution and laws of the United States, and is void.
14. That the jury has received evidence, papers, and documents not authorized by the court.
15. That the court has admitted illegal testimony.

16. That the jury have been guilty of misconduct tending to prevent a fair and due consideration of the case.

17. That the verdict has been decided by means other than by a fair expression of opinion on the part of all the jurors.

18. That the court has misdirected the jury in a material matter of law, and refused to give instructions asked by defendant.

32 19. That the charge of the court was calculated to and did mislead the jury.

20. That the court failed to instruct the jury of the defendant's defense, and failed in any manner to bring to the attention of the jury that the defendant had made or set up any answer to the petition of the plaintiff, although the court had been requested to instruct generally upon the law of the case by the defendant.

21. Newly discovered evidence, material for the defendant, which he could not, with reasonable diligence, have discovered and procured at the trial.

22. That the court had no jurisdiction of the action.

23. That this action, and the course of trial had herein, has been in defiance of the rights of the defendant given and guaranteed him by the Constitution and laws of the United States.

24. Error of law occurring at the trial and excepted to by the defendant, the party making this application for a new trial.

The plaintiff and its attorneys will take notice that on the hearing of this motion affidavits and other evidence will be used and heard on the part of the defendant.

THOMAS P. FENLON,
C. A. HILLER, AND
WATERS & ENSMINGER,
Att'ys for Def't.

33 Which motion for a new trial having been argued and considered, was by the court overruled. The court, upon overruling said motion, filed in writing the following opinion and syllabus, which is in words and figures as follows:

34 *Syllabus.*

THE STATE OF KANSAS *ex rel.* W. A. JOHNSTON, Attorney General,
vs.
JOHN FOSTER.

Original proceedings in *quo warranto.* Motion for a new trial. Motion overruled.

By the court, HORTON, C. J.:

1. If a county attorney neglects or refuses to perform any act which it is his duty to perform, or shall corruptly perform any such duty, he forfeits his office, and may be removed therefrom by a civil action, in the nature of a proceeding in *quo warranto,* in the supreme court.

2. The provision in the act to prohibit the manufacture and sale

of intoxicating liquors, except for medical, scientific, and mechanical purposes, adopted in 1881, to the effect that "if any county attorney shall fail or refuse to faithfully perform any duty imposed upon him by this act, he shall be deemed guilty of a misdemeanor, and on conviction thereof in the district court shall be fined in any sum not exceeding five hundred dollars, and on such conviction shall be deemed to be removed from office," is not the sole and exclusive remedy for the removal from office of a county attorney who neglects or refuses to perform the duty required of him by said act, or who shall corruptly perform any such duty.

3. A civil action instituted in the manner provided in the Code of Civil Procedure for the removal of a county attorney who neglects or refuses to perform any act which it is his duty to perform, or who corruptly performs any such duty, reaches only to the possession of his office and its emoluments. The criminal prosecution provided for in section 12 of the prohibitory act is an additional or cumulative remedy, and, in addition to the forfeiture of office, subjects the guilty official, on conviction thereof in the district court, to the infliction of a fine not exceeding five hundred dollars.

4. Where a county attorney is charged with neglecting or refusing to perform any act which it is his duty to perform under the prohibitory law, or is charged with corruptly performing any such duty in a civil action to remove him from office, it is not a good defense to answer that the people of his county are opposed to the prosecution of the violators of the law, and therefore, in the exercise of his official discretion, he dismissed all cases of this class brought by him.

5. If a law enacted by the Legislature has not the support of public sentiment, this may be, under some circumstances, a reason for its amendment or repeal; but in a civil action brought against a county attorney, to remove him from office for neglecting to perform his duties thereunder, it is not a good defense for his refusing to attempt its enforcement.

6. The charge of the supreme court delivered to the jury upon the trial of this case referred to, and held not to be partial, misleading, or in any manner prejudicial to the rights of the defendant.

7. The provisions of the prohibitory act referred to in the charge
of the court delivered to the jury upon the trial of this case,
35 and the sections thereof commented upon in this opinion:
Held, Not to be in conflict with the Constitution of the United
States, or the laws passed in pursuance thereof.

8. The case of the State *v.* Allen, 5 Kas., 213, referred to and followed.

9. The case of the State *v.* Wilson, 30 Kas., 661, distinguished.

All the justices concurring.

A true copy. Attest:

——— ———,
Clerk Supreme Court.

36 THE STATE OF KANSAS *ex rel.* W. A. JOHNSTON, Attorney General,

vs.

JOHN FOSTER.

Original proceedings in *quo warranto*. Motion for a new trial. Motion overruled.

The opinion of the court was delivered by HORTON, C. J.:

The defendant has filed a motion for a new trial. Various reasons are alleged. We shall refer to those discussed by counsel upon the hearing of the motion.

The provision in the act of 1881, prohibiting the manufacture and sale of intoxicating liquors, except for specific purposes, that "if any county attorney shall fail or refuse to faithfully perform any duty imposed upon him by this act, he shall be deemed guilty of a misdemeanor, and on conviction thereof in the district court shall be fined in any sum not exceeding $500, and on such conviction shall be deemed to be removed from office," does not furnish the exclusive remedy for the removal of county attorneys for misconduct in office, and does not conflict with or abrogate sec. 180, chap. 25, page 312, Comp. Laws of 1879, which reads: "If any board of county commissioners, or any commissioner, or any other county officer, shall neglect or refuse to perform any act which it is his duty to perform, or shall corruptly or oppressively perform any such duty, he shall forfeit his office and shall be removed therefrom by civil action in the manner provided in the Code of Civil Procedure." That provision of the prohibitory law affords merely an additional or cumulative remedy. Somewhat similar provisions in regard to persons holding public offices were adopted subsequently to the enactment of sec. 180. Thus "every person exercising or holding any office or public trust, who shall be guilty of wilful and malicious oppression, partiality, misconduct, or abuse of authority in 37 his official capacity, or in color of his office, shall, on conviction, be punished by imprisonment in the county jail for a term not exceeding one year, and fined not exceeding one thousand dollars." Also, "every person who shall be duly convicted of any of the offenses mentioned in the preceding section * * * shall be forever disqualified from holding any office of honor, trust, or profit, under the laws of the State, and from voting at any election." Further, "every officer or person holding any trust or appointment who shall be convicted of any wilful misconduct or misdemeanor in office, or neglect to perform any duty enjoined upon him by law, where no special provision is made for the punishment of such misdemeanor, misconduct, or neglect, shall be punished by fine not exceeding $500, or by imprisonment in the county jail not exceeding one year, or by both such fine and imprisonment." This is supplemented as follows: "Every officer who shall be convicted of any misdemeanor or misconduct in office, or who shall be convicted of any offense which by this or any other statute is punishable by disqualification to hold office, shall, in addition to the other punishments

prescribed for such offenses, forfeit his office." Secs. 207, 209, 212, 213, chap. 31, Comp. Laws of 1879. It has never been claimed, and cannot be claimed with reason, that these sections enacted subsequently to the statute, relating to counties and county officers, were intended by the Legislature to be the exclusive remedy for the removal of county officials guilty of misconduct, or were adopted as a substitute for said sec. 180. The latter section provides for a civil action reaching only to the possession of the office and its emoluments; the other is a criminal proceeding, which, in addition to the forfeiture of the office, subjects the guilty official to the infliction of a
fine or imprisonment in the county jail, or to both fine and
38 imprisonment. If a county attorney is removed from office
by a civil action for the forfeiture of his office on account of his misconduct, he is not thereby relieved from criminal prosecution. The removal of the defendant by the proceedings, commenced against him in this court, will not render him less amenable to prosecution for his official misconduct in the district court of his county. That the Legislature did not intend a criminal prosecution to be the exclusive remedy against a county attorney who fails or refuses to perform the duties imposed upon him by the prohibitory law is apparent, because it is expressly provided therein: "It shall be the duty of the county attorney, under penalty of forfeiture of his office, to prosecute any and all persons guilty of any violation of the provisions of the act."

This is a separate and independent clause from the provision relating to the trial and conviction of an unfaithful county attorney by a criminal prosecution in the district court of his county, and is in harmony with said sec. 180.

Counsel refer to the State *v.* Wilson, 30 Kas., 661, as decisive that the declaration of the forfeiture of the office of county attorney can only follow his conviction and sentence in the district court of his county. Counsel, in their reference and argument, are in error. In the case to which we are referred the action was brought to oust a defendant from the office of mayor of a city of the first class. Said sec. 180 and the provision last quoted from the prohibitory act have no application to city officials. It was expressly decided in the case cited that the Legislature may provide for the forfeiture of office for misconduct, independent of any criminal action, but that the statute relating to cities made no provision that a mayor shall forfeit his
office *ipso facto* by reason of any act of omission of the char-
39 acter of those charged in the case then before the court. The
most that can be urged upon this point of the effect of the decision in the case of the State *v.* Wilson, *supra*, is that the Legislature, by enacting in the prohibitory law a special provision that a county attorney who fails or refuses to perform his duty shall be guilty of a misdemeanor and prosecuted in the district court of his county, intended thereby to cover the entire ground of criminal prosecutions against a county attorney who fails to comply with the duties imposed upon him by that law, and to this extent supplanted the provisions of the crimes act providing for criminal prosecutions for official misconduct. In the Wilson case the removal was denied

because the statute failed to declare a forfeiture for the misconduct complained of; therefore, that case is not conclusive in this, as the statute expressly provides for a forfeiture of the office of county attorney for the misconduct alleged in the petition.

It is insisted in the preliminary motions prior to the impanelling of the jury, also upon the trial, and it is again insisted, that this proceeding is a criminal one—if not in form a criminal prosecution, that at least it is in substance a criminal one, whatever the procedure may be. Not so This is not an action to recover a fine or penalty, as was the case of Sanders *v.* The A., T. & S. F. R. R. Co., instituted in the district court of Lyon county. 22 Kas., 1. It is not an action for which any punishment by imprisonment or fine may be inflicted upon the defendant. It is not an action for punishment at all. The purpose of the proceeding is to remove the defendant from office, and this may be done by a civil action in the manner provided in the Code of Civil Procedure. Sec. 210 (180), Comp. Laws of 1879. State *v.* Allen, *supra.* Notwithstanding
40 this proceeding, and the result attending it, the defendant may be prosecuted in his county for his failure and refusal to faithfully perform the duties imposed upon him by the prohibitory act, and if convicted may be fined in any sum not exceeding $500. In such an action he could not plead this proceeding in bar, and in this proceeding he cannot defend on the ground that as the statute makes his misconduct in office a misdemeanor he cannot be ousted by a civil action.

The objections made to the charge of the court are threefold:

Of these, in their order, the following language is criticized: "A county attorney cannot be controlled by the wish or sentiment of the people of his county in the prosecution of the violators of law. A county is a political division of the State, and the county attorney, within his county, is a representative of the State. After he has commenced prosecutions under the prohibitory law against parties guilty of the violation thereof, and has been furnished with the names of witnesses by whom the violations can be proved, he is not to be deterred from his duty by public clamor." A careful consideration of the arguments presented convinces us that this instruction is not erroneous. A county attorney, before entering upon the duties of his office, must take and subscribe an oath that "he will support the Constitution of the United States and the constitution of the State of Kansas, and faithfully discharge the duties of his office." After the utterance of this oath he cannot sit down with folded hands and arms and refuse to perform the duties imposed upon him solely upon the ground that the sentiment of the community or county in which he resides is in opposition to the enforcement of the criminal laws of the State; such action upon his part would tend to increase lawlessness. Under such a doctrine the more lawless the community the less the criminal prosecutions. Such action
41 would be a temptation for malefactors to create sentiment against the criminal laws, and to a great degree the law-loving and law-abiding citizens would be at the mercy of the vicious and criminal classes. The State owes the duty to its citizens to pro-

tect them in the full enjoyment of all their rights, and if the lawless element of any community or county happens, for the time being, to be in the majority, the orderly, peaceable, and quite citizens ought not be subjected to their domination. The laws of the State ought not to be suspended at the will of any class, much less of a class who flagrantly avow their determination to defy law. The county attorney, within his county, to a certain extent, is a representative of the State. He is to prosecute in his county for the State. He is the officer upon whom the State relies for the prosecution of all criminal offenses within his jurisdiction. If he fails or refuses to act, the law is voiceless and powerless. It is paralyzed. It protects no one needing protection; it punishes no one deserving punishment. If a county attorney vigilantly and earnestly discharges his duty by frequent prosecutions in a community seemingly indifferent to the enforcement of law, his action will of necessity call the attention of the public to the disregard of law and the dangerous consequences flowing therefrom; his action will oftentimes awaken a community to a just realization of its duty, and arouse its members from indifference to a willing obedience to all that the law demands; his action will oftentimes result in enlightening public sentiment and in crystallizing public opinion in favor of the enforcement of all the laws. If a county attorney may wilfully refuse to act in one particular class of criminal offenses on account of the opposition to be expected from
the sentiment of the community in which he resides, he may
42 refuse, for like cause, to act in all classes of criminal offenses.
Thus, if he has the discretion to say he will not attempt to enforce the prohibitory laws in his county, he has also the discretion to refuse to enforce the statute relating to murder, larceny, forgery, and the other crimes. It cannot be that a county attorney has such discretion or power. If it were so decided, "'twill be recorded for a precedent, and many an error by the same example will rush into the State."

If a law enacted by the Legislature has not the support of public sentiment this may be, under some circumstances, a reason for its amendment or repeal; but it is not a good defense for a county attorney, upon whose lips is fresh the oath of office, for refusing to attempt its enforcement.

It is claimed the court failed to charge the jury of the defense set forth by the defendant; and also failed to bring to the attention of the jury that the defendant had made or set up any answer to the petition filed against him. After the empanelling of the jury the defendant filed the following written admissions:

"First. That the defendant is county attorney of Saline county, as alleged in the petition.

Second. That the persons named in the petition were guilty of violating the prohibitory law, as stated therein.

Third. That the defendant was notified of such fact and knew the same of his own personal knowledge.

Fourth. That after the notification he filed complaints against these parties for such offenses before the justice of the peace named in the petition.

Fifth. That said cases were continued from time to time with
43 the consent of counsel on both sides.

Sixth. That said cases were dismissed by the justice of the peace with the consent of the defendant, upon the payment of all costs by them."

These admissions rendered it unnecessary to refer to the answer of the defendant, as they changed the issues made up by the pleadings. By the admissions, the issues in the case were narrowed to the question of the conduct of the defendant in prosecuting and dismissing the criminal cases commenced by him; thereafter it was only necessary for the State to prove that he acted corruptly, or with bad motives, to make out its case. After such admissions the State was called upon only to establish by the preponderance of the evidence that the continuances of the cases from May 14, 1883, to the 1st of September, 1883, were inexcusable, and that the cases were dismissed by the defendant to shield the persons therein charged with offenses from the consequences and penalties of their acts; or that the cases were dismissed by him because he had deliberately resolved not to enforce the prohibitory law in his county, or prosecute the violators thereof. The reading of the answer to the jury, in view of the admissions, would have misled them and called their attention to issues not before them for consideration.

It is further claimed that the charge of the court did not refer to the evidence given by the defendant, and in his behalf, concerning the reasons for the various continuances of the criminal cases brought by him, and the grounds for their dismissal. On the day that the cases were dismissed, before the justice of the peace, the defendant filed, in writing, with the justice, the following reasons therefor:

"First. I believe, from the information I have received from all parts of the county, that it is not the wish of the people to
44 have this class of cases prosecuted at this time. Their reasons are the expense that will be incurred upon the county; the uncertainty of conviction in some instances, and the bad feeling and trouble each prosecution will bring, etc.

Second. The sentiment, as I now learn it, seems to have been the feeling of the people at the last general election.

Third. No person has come to me, and, in earnest, requested me, as county attorney, to attempt to enforce the prohibitory law in this county.

Fourth. The city of Saline has ample and valid ordinances for enforcing said law, and it is the feeling of the people in the county, I believe, that Saline should attend to it, be responsible for, and pay the expenses for it, that is, the enforcement of the prohibitory law.

Fifth. I believe these prosecutions to have been suggested by the sheriff of Saline county under mistake as to the sentiment of the people of the county, or for some ulterior reason, or by the mistaken advice of his friends, and not with an actual intent to enforce said law.

Sixth. I ought, at least, to have the assistance of a prosecuting witness. No one has offered to be such.

Seventh. I stand ready to enforce the prohibitory law, and all laws, upon any person coming forward willing to sign and swear to a complaint; that is, where the statements show that an offense she been committed."

Upon the trial, evidence was offered on the part of the defendant that the cases were continued before the justice from time to time on account of professional engagements of counsel on one side or the other, and that the cases were finally dismissed because the justice refused a continuance on August 31, 1883, to enable the defendant and 45 the attorney opposing him in those cases to attend the following September session of this court. We charged the jury that "evidence had been introduced before them tending to prove the various continuances of the cases commenced by the defendant, and the proceedings attending their dismissal," and stated to the jury that "the law presumes an officer performs his duty, and in this case the burden of the proof was upon the State." We declared, however, to the jury "that the written reasons furnished no excuse or justification for the defendant in this action—of ouster against him—for dismissing the cases." We are fully satisfied with this declaration. The written reasons show upon their face that the defendant was not favorable to the enforcement of the prohibitory law in his county, and that he attempted, by the filing of the papers containing his reasons for dismissing the cases, to excuse himself for the non-performance of his duties, upon his belief that it was not the wish of the people to have that class of cases prosecuted. Further than this, in his reasons he unnecessarily and improperly censured the sheriff of Saline county for the performance of an official duty. We submitted to the jury, in the language of the charge, the question whether the defendant was acting in good faith in the prosecution and dismissal of the cases. The evidence, *pro* and *con*, upon the question of the conduct of the defendant and the motives by which he was actuated, was fully and elaborately discussed before the jury. The counsel were given wide latitude in their arguments, and upon the part of the defendant earnestly and ably commented upon all the evidence tending to establish the continuances of the cases were necessary, and that the dismissals thereof were caused by matters over which the defendant had no control. The argument to the jury on their part was that the defendant acted in all respects faith-46 fully and honestly in the discharge of his duties. The jury were informed "if he was influenced, to dismiss the cases by a desire to shield and protect the persons against whom he had filed his complaints from punishment for their acts, their verdict should be for the State." They were further informed, "if the defendant, at the time of the dismissal, had deliberately resolved not to enforce the prohibitory law in his county, and filed his motion for the dismissal of the cases for that reason, the State was entitled to a verdict." In behalf of the defendant, the jury were directed "that, as county attorney of Saline county, he had discretionary power, within certain limits, in instituting and prosecuting criminal actions in his county, and if he honestly exercised that discretion, either in bringing the same or failing to bring the same, or in the conduct and disposition of the cases after they were brought, he could not be removed from his office."

The jury were further directed that "if, after consideration of all the evidence, they should find the defendant, in the exercise of a fair and just discretion, and acting in good faith, dismissed the cases commenced by him for reasonable cause, the verdict must be in his behalf; that, in fact, the main question in the case for the jury to determine was whether the defendant acted in good faith in the discharge of his duties as county attorney in the cases named in the petition. If he did not, their verdict must be against him; if he faithfully and properly discharged his duties, the verdict must be for him."

We have considered all the exceptions taken to the charge, and find none of them tenable. Upon the evidence presented we do not conceive the charge was partial or misleading, or in any manner prejudicial to the rights of the defendant. We do not think 47 the instructions asked for on the part of the defendant conflicting with the law as declared in the charge ought to have been given. We think the case was fairly submitted to the jury in such a manner as to permit them intelligently and impartially to pass upon the issue presented. It was for them to say whether the criminal cases were dismissed by the defendant from corrupt or bad motives, or whether they were dismissed on account of the reasons testified to by the defendant and his witnesses. The witnesses who testified concerning the dismissal of the cases were before the jury in person. The jury saw them. They heard them testify. It was their province to determine their credibility, to believe or disbelieve them. Evidently, from the verdict, the jury did not believe the defendant prosecuted the criminal cases in good faith, or that he dismissed them for any reasonable or sufficient cause. The verdict is sustained by sufficient evidence, and we cannot say that it is against the weight or preponderance of the evidence.

Something has been said that if the defendant acted from ignorance of the law, or a misconception of his duty, he ought not to be removed. In brief, that he ought not to suffer for any error of judgment. It is an answer to all this that the defendant did not claim to be ignorant of his duty. He did not base his defense upon a mistake of judgment or ignorance; he attempted to show upon the trial that the cases dismissed by him were finally disposed of for other and different reasons than those contained in his written statement filed with the justice of the peace. But even if the defendant had made the defense contended for, it is doubtful, in a civil action of this character, if he could resist ouster upon the ground that he mistook the law, and, therefore, failed or neglected to perform his official duty.

48 The fourth defense in the answer copies in full the act to prohibit the manufacture and sale of intoxicating liquors, except for medical, scientific, and mechanical purposes, and avers that it is contrary to and against the Constitution of the United States and the laws passed in pursuance thereof. This much of the

answer presented no defense whatever, and might well have been stricken from the pleading. In our opinion, there is no provision of the prohibitory act referred to in the charge, or involved in this case, violative of the Constitution of the United States or of any act of Congress.

In consideration that many of the questions arising in this case have been passed upon and settled by the decision of this court in State *v.* Allen, *supra*, we think it unnecessary to make further comments upon the matters submitted to us. Many of the questions of law involved in this case were decided in that case, and, generally, we have applied to this case the principles of law stated therein.

The motion for a new trial will be denied, and upon the verdict of the jury the court finds that the defendant forfeited his office as county attorney of Saline county, and it is, therefore, ordered that judgment be entered that he be removed therefrom.

All the justices concurring.

A true copy. Attest:

—— ———,

Clerk Supreme Court.

49 To the rulings and decision of the court in refusing a new trial the defendant then and there and at the proper time excepted; that on the 4th day of January, 1884, the defendant filed his answer in said action, in the fourth defense of which answer the defendant alleged and charged that the law of the State of Kansas therein stated at length was repugnant to the Constitution of the United States and void; that by reason of said law being void for the reason aforesaid the defendant was neither chargeable nor punishable with any neglect of duty attempted to be imposed upon him as county attorney or attempted to be made punishable thereby, and the court held that all the sections of the said law referred to and commented upon in the charge of the court to the jury and the sections of said law referred to and commented upon in the opinion of the court denying the motion for a new trial were not repugnant to the Constitution of the United States, but were valid thereunder, to all of which rulings and decisions of the court the defendant then and there and at the proper time excepted; that afterwards, upon the argument of the motion for a new trial, the defendant again urged that said law was repugnant to the Constitution of the United States; that the said court again decided that all of the sections thereof referred to and commented upon in the charge of the court or in the opinion of the court were not repugnant to the Constitution of the United States, to all of which rulings and decisions of the court the defendant then and there excepted; that afterwards, on the 1st day of April, 1884, final judgment was rendered in the action against the defendant, removing him from office of county attorney of Saline county, and taxing him with the costs.

The defendant, by this bill of exceptions, alleges that he desires to preserve and present two questions which, he claims, arise under the Constitution of the United States—that is to say:

First. Was the defendant entitled to a criminal trial, as aforesaid, under and by the established course of the criminal law of the State of Kansas?

Second. Are the sections of the statute of the State of Kansas, set up in the fourth answer of the defendant, which were referred to and commented upon in the charge of the court to the jury and in the opinion of the court denying the motion for a new trial, repugnant to the Constitution of the United States? The court decided the defendant was not entitled to be tried under and in accordance with the criminal code of procedure for the trial of criminal cases, and the court further decided that the sections of the statute set up in the fourth defense of the defendant's answer, which were referred to and commented upon in the charge to the jury and in the opinion of the court filed denying the motion for a new trial, were not repugnant to the Constitution of the United States.

The defendant claimed of and urged on the supreme court of the State of Kansas that these questions and each of them should be decided in his favor by virtue of the provisions of the Constitution of the United States, and upon the argument upon his motion for a new trial he particularly urged upon the supreme court that these questions and each of them should be decided in his favor by reasons of the provisions of sec. 1 of the 14th art. of the Constitution of the United States. It was a fact, admitted upon the trial by both parties, that the office of county attorney of Saline county was and is a public office, created by law, with certain pay and emoluments, and that the defendant was elected thereto at an election held in November, 1882, for the legal term of two years. End of bill of exceptions.

50 THE STATE OF KANSAS, *ss:*

The foregoing bill of exceptions, in above-entitled action, having been presented to the judges of the supreme court of the State of Kansas for their allowance, by the defendant, on the 1st day of April, 1884, being the same day on which the defendant's motion for a new trial was overruled by said supreme court, and the same having been examined by said judges, is found and declared by them to be true; and the same is accordingly allowed and signed by said judges as the true bill of exceptions in said action; and the same is by them ordered to be filed with the pleadings as a part of the record in said cause.

ALBERT H. HORTON,
Chief Justice of Kansas.
D. M. VALENTINE,
Justice of the Supreme Court.
D. J. BREWER,
Justice of the Supreme Court.

51 In the Supreme Court of the State of Kansas *ss:*

I, C. J. Brown, clerk of the supreme court of the State of Kansas, the said court being a court of record, and the final court of judicature of all questions of law and equity, within the State of Kansas, do hereby certify that the above and foregoing record to which this certificate is attached, and comprising 41 pages, being from page to page to 41 inclusive, is a full, true, and correct copy of the several pleadings, orders, proceedings, bill of exceptions, motion for a new trial, and judgment, in a cause heretofore pending and finally adjudicated in the said supreme court of the State of Kansas, wherein the State of Kansas on the relation of W. A. Johnston, attorney general of the State of Kansas, was and is plaintiff, and John Foster, county attorney of Saline county, in the State of Kansas, was and is defendant, and as the same appears from the original record in said cause now on file and of record in my office.

In witness whereof, I have hereunto set my hand as said clerk, and have hereto set the seal of the supreme court of the State of Kansas, at the city of Topeka, this second day of April, 1884.

[SEAL.] C. J. BROWN,
Clerk of the Supreme Court of the State of Kansas.

Endorsed on cover: Kansas supreme court. No. 1056. John Foster, county attorney of Saline county, Kansas, plaintiff in error, *vs.* The State of Kansas *ex rel.* W. A. Johnston, attorney general of the State of Kansas. Filed 11th October, 1884.